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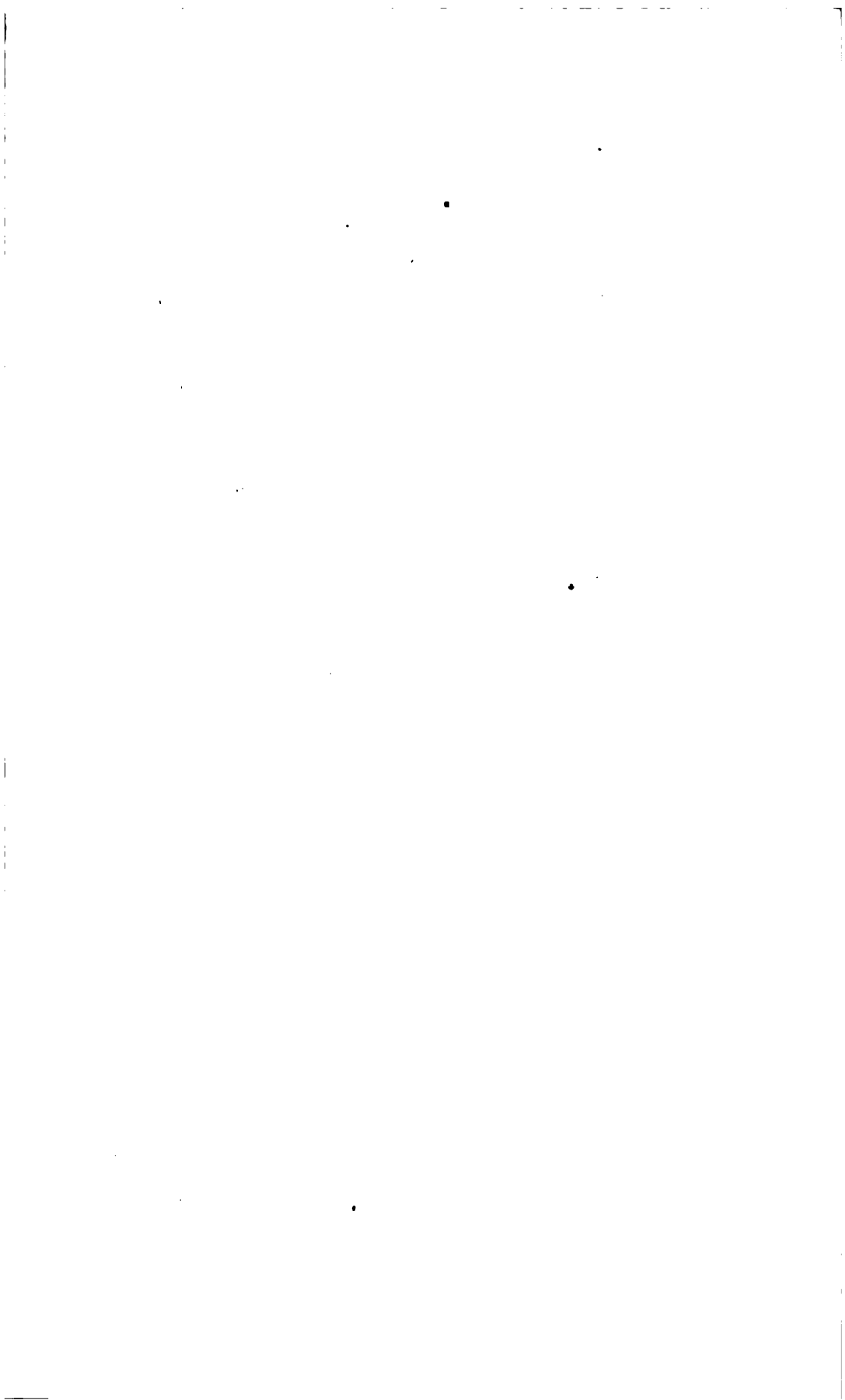
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A
PRACTICAL TREATISE
ON
THE LAW OF TRUSTS
AND
TRUSTEES.



BY



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TO
THE RIGHT HONOURABLE
SIR EDWARD BURTENSCHAW SUGDEN,
LATE LORD HIGH CHANCELLOR OF IRELAND,
ONE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL,
&c. &c. &c.
WHOSE UNRIVALLED LEGAL ATTAINMENTS
WERE LONG THE ORNAMENT OF THE BAR,
AND LATELY SHED A LUSTRE UPON THE BENCH,
TO WHOM THE PROFESSION
IS DEEPLY INDEBTED FOR HIS VALUABLE WRITINGS,
AND THE PUBLIC
FOR THE JUDICIOUS ENACTMENTS
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This Work
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19, OLD SQUARE, LINCOLN'S INN,

April 19, 1837.

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		4 & 5, c. 23, Escheat Act ...	217, 491 n.
		c. 29, Loans upon Irish Security	310

N. B. *The Appeal in TIMSON v. RAMSBOTTOM, p. 509, has been compromised.*

INTRODUCTORY VIEW
OF THE
RISE AND PROGRESS OF TRUSTS.

THE origin of trusts, or rather the adaptation of them to the English law, may be traced to the ingenuity of fraud. By the interposition of a trustee the debtor thought to withdraw his property out of the reach of his creditor, the freeholder to intercept the fruits of tenure from the lord of whom the lands were held, and the body ecclesiastic to avoid the restrictions directed against the growing wealth of the church by the statutes of mortmain. Another inducement to the adoption of the new system was the natural anxiety of mankind to acquire that free power of alienation and settlement of their estates, which by the narrow policy of the common law they had hitherto been prevented from exercising.

Originally the only pledge for the due execution of the trust was the faith and integrity of the trustee; but the mere feeling of honor proving, as was likely, when opposed to self-interest, an extremely precarious security, John Waltham, Bishop of Salisbury, a Chancellor in the reign of Richard the Second, invented the writ of *sub-pœna*, by which the trustee was liable to be summoned into Chancery, and compellable to answer upon oath the

allegations of his *cestui que trust*. No sooner was this protection extended, than half the lands in the kingdom became vested in feoffees to uses. Thus, in the words of an old counsellor, the parents of the trust were Fraud and Fear, and a court of conscience was the Nurse (a).

Of trusts there were two kinds: the *simple* trust, and the *special* trust. The *simple* trust, which also passed by the name of a *use*, was defined in legal phraseology to be, "a confidence, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use* should take the profit, and that the terre-tenant should execute an estate as he should direct." In order rightly to understand what was meant by this rather technical description, we shall briefly consider the principles that were recognised by courts of equity (for these courts had the exclusive jurisdiction of trusts), first, with reference to the terre-tenant or feoffee to uses, and secondly, with reference to the beneficial proprietor, or *cestui que use*.

With respect to the feoffee to uses, it was held to be absolutely indispensable that there should be *confidence in the person*, and *privity of estate*. For want of the requisite of *personal confidence* it was ruled that a corporation could not stand seised to a use; for how, it was said, could a corporation be capable of confidence when it had not a *soul*? Nor was it competent for the king to sustain the character of trustee; for it was thought inconsistent with his high prerogative that he should be made responsible to his own subject for the due administration of the estate. And originally the *subpcena* lay against the trustee himself only, and could not have been sued against

(a) *Attorney General v. Sands*, Hard. 491.

either his heir or assign ; for the confidence was declared to be personal, and not to accompany the devolution of the property (*b*). But the doctrine of the court in this respect was subsequently put on a more liberal footing, and it came to be held that both heir and assign should be liable to the execution of the use. An exception however was still made in favour of a purchaser for valuable consideration not affected by notice (*c*).

The meaning of *privity of estate* may be best illustrated by an example. Had a feoffment been made to A. for life to his own use, with remainder to B. in fee to the use of C., and then A. had enfeoffed D. in fee, in this case, though D. had the land, yet, as he did not take the identical estate in the land to which the use in favor of C. was attached, he was not bound by C.'s equitable claim. And, by the same rule, neither tenant by the curtesy, nor tenant in dower, nor tenant by *elegit*, was liable to the execution of the use, for their interests were new and original estates, and could not be said to have been impressed with the use. So the lord who was *in* by escheat, a disseisor, abator, and intruder, were not amenable to the *subpœna* ; for the first claimed by title paramount to the creation of the use ; and the three last were seised of a tortious estate, and held adversely to the feoffee to uses.

With respect to the *cestui que use*, the principle upon which his whole estate depended was also what in legal language was denominated *privity*. Thus, on the death of the original *cestui que use*, the right to sue the *subpœna* was held to descend indeed to the heir on the ground that *hæres eadem persona cum antecessore* ; but the wife of the *cestui que use*, or the husband of a feme *cestui que use*, and a judgment creditor, were not admitted to the

(*b*) 8 E. 4. 6; 22 E. 4. 6. (*c*) Keilway, 42. b.

same privilege ; for their respective claims were founded not on privity with the person of the *cestui que use*, but on the course and operation of law. And for the like reason a use was not assets, was not subject to forfeiture, and on failure of heirs in the inheritable line did not escheat to the lord. And as a use was regarded in the light of a *chose en action*, that is, a mere right to enforce a claim against another in a court of equity, the use was held not to be assignable (*d*).

The *special trust* (for hitherto we have spoken of the simple trust or use only) was where the conveyance to the trustee was to answer some particular and immediate purpose; as upon trust to reconvey in order to change the line of descent, upon trust to sell for payment of debts, &c. In the special trust the duty of the trustee was not, as in the use, of a mere passive description, but imposed upon him the obligation of exerting himself in some active character for the accomplishment of the purpose prescribed. In case the trustee had neglected his duty, the *cestuis que trust* might have filed a bill in Chancery, and have compelled him to proceed in the execution of his office (*e*).

Both the *use* and the *special trust* were applicable to chattels real and personal, as well as to freeholds ; but trusts of chattels were for obvious reasons much less frequently in practice. The amount of the property was small ; the owner, even without the interposition of a trustee, had the fullest control and dominion over it ; and a chattel interest, as it followed the person, was equally subject to forfeiture whether in the custody of a trustee, or in the hands of the beneficial proprietor (*f*). But to

(*d*) *Finch's case*, 4 Inst. 85.

Powers, No. 1.

(*e*) See the case in the reign of
Hen. 7, Append. to Treat. of

(*f*) 5 H. 5. 3. 6.

the extent, whatever it was, to which trusts of chattels were adopted, they were conducted upon the same principles, *mutatis mutandis*, as were trusts of freeholds; the right to sue a *subpoena* turned equally on privity (*g*), and the interest of the *cestui que trust* was held not to be assignable (*h*).

Such was the nature of trusts as they stood at *common law*; but the manifold frauds and mischiefs to which the new system gave occasion, particularly "the great unsurety and trouble arising thereby to purchasers," called loudly from time to time for the enactment of remedial statutes. One of the most important of these was the 1 Ric. 3, c. 1, the substance of which may be expressed in the terms of the preamble, viz. that "all acts made by or against a *cestui que use* should be good as against him, his heirs, and feoffees in trust," in other words, that all dealings of the *cestui que use* with the trust property should have precisely the same legal operation, as if the *cestui que use* had himself been the legal owner. To what interests the legislature intended this statute to be applicable has not on all hands been agreed. A feoffment in fee to uses was clearly the case primarily intended. Upon a feoffment in tail, it seems no use could have been declared, for a tenant in tail was incapacitated by the statute *de donis* from executing estates (*i*). With respect to a feoffment for life to uses, there appears to be no reason upon principle, except so far as the language of the act may be thought to furnish any inference, and certainly there is no objection on the score of authority, why the *cestui que use* might not have passed the legal estate by virtue of the statutory power. It has been contended by Mr. Sanders, that on a feoffment for life no use could

(*g*) *Witham's case*, 4 Inst. 87. (*h*) Jenk. 244, c. 30.

(*i*) Co. Lit. 19. b.

have been declared, on the ground that, as the tenant for life held of the reversioner, the consideration of tenure would have conferred a title to the beneficial interest on the tenant for life himself (*k*). But this reasoning can have no application, where the estate for life was not *created*, for, where it was merely *transferred*, the assignment of the life-estate was not to be distinguished in this respect from the conveyance of the fee; in each case there was no consideration of tenure as between the grantor and grantee, but in each case the services incident to tenure were due from the grantee to a third person (1). It is clear the statute embraced *uses of lands* only, and did not extend either to *special trusts*, or to *trusts of chattels*: not to special trusts, because the trustee combined in himself both the legal estate and the use, though compellable in Chancery to direct them to a particular purpose; and not to trusts of chattels, because the preamble and the statute were addressed to *cestui que use* and *his heirs*, and to *feoffees in trust*.

The mischiefs of the system increasing more and more, (the statute of Richard occasioning still greater evils than

(*k*) Sand. on Uses, c. 1, s. 6, div. 2.

(1) The state of the law upon this subject appears to have been as follows:—1. That on the creation of an estate for life, had no use been mentioned on the face of the instrument, the tenant for life had held for his own benefit in compensation of his services; Perk. s. 535; B. N. C. 60; Br. Feff. al. Uses, 10; and no use could have been averred in contradiction to the use implied. See Gilb. on Uses, 57. 2. That had a use been expressly declared by the deed, the tenant had been bound by the terms on which he accepted the estate; Perk. s. 537; Br. Feff. al. Uses, 10, 40. 3. Unless a rent had been reserved, or consideration paid, in which case a court of equity would not have enforced the use against the purchaser for valuable consideration. B. N. C. 60; Br. Feff. al. Uses, 40. 4. That on the assignment of a life estate a use might have been declared, as on a conveyance in fee.

it remedied, from the facility it gave to the *cestui que use* and his feoffee, who had now each the power of passing the legal estate, of defrauding by collusion the *bonâ fide* purchaser), the legislature again interposed its authority by the 27 Hen. 8, c. 10, and enacted, that "where any person stood *seised* of any hereditaments to the use confidence or trust of any other person, or of any body politic, such person or body politic as had any such use confidence or trust should be deemed in lawful *seisin* of the hereditaments in such like estates as they had in use trust or confidence." (2)

Uses by the operation of this statute became merged in the legal estate; but *special trusts* and *trusts of chattels* were not within the purview of the act: the former, because the use, as well as the legal interest, was in the trustee; the latter, because a termor is said to be *possessed*, and not to be *seised* of the property.

(2) As this statute *does* operate on the use of a life estate, but does *not* apply to a *seisin* in tail, the doctrine of Mr. Sanders, that prior to the 27 Hen. 8, there was no use of a *seisin* either in tail or for life, seems open to the following objections:—1. That the statute in executing the use of a life-estate operates on an interest which at the time of the enactment had no existence; and, 2dly, That in *not* executing a use declared on a *seisin* in tail, it operates differently on two estates that fall within precisely the same principle. To meet the former objection, Mr. Sanders holds the statute of Hen. 8 to be prospective, and distinguishes it from the statute of Richard, which he considers not to be prospective, by observing that the latter employs the word "use" only, while the former has the additional term of "trust;" but to this it may be answered, that, although the *statute* of Richard does not contain the word trust, the *preamble* does, and that the distinction contended for between use and trust had no existence until a comparatively recent period. See *Altham v. Anglesey*, Gilb. Eq. Rep. 17. To obviate the latter objection, it is maintained by Mr. Sanders that tenant in tail *is* within the statute of Hen. 8: an opinion which, it is submitted, is directly opposed to the general stream of authority. Co. Lit. 19. b.; Shep. Touch. 509; Gilb. on Uses, 11, and Sir E. Sugden's note, *ib.*

In the room of uses which were thus destroyed as they arose, the judges by their construction of the statute created a novel kind of interest, since distinguished by the name of *Trust*. Before the statute of Hen. 8, a person, to have had the complete ownership, must have united the possession of the land and the use of the profits. The possession and the use were even at common law recognised as distinct interests, though the *cestui que use* was left to Chancery for his remedy (*l*). On a feoffment to A. to the use of B. to the use of C., the possession was in A., the use in B., and the limitation over to C. was disregarded as surplusage. When the statute of Hen. 8 was passed, it executed the estate in B. by annexing the possession to the use; but having thus become *functus officio* it did not, as the act was construed, affect the use over to C. However, Chancery, now that uses were converted into estates, decreed C. to have a title in equity, and enforced the execution of it under the name of a trust (*m*).

"Interests in land," said Lord Hardwicke, "thus became of three kinds: first, the estate in the land itself, the ancient common-law fee; secondly, the use, which was originally a creature of equity, but since the statute of uses it drew the estate in the land to it, so that they were joined and made one legal estate; and, thirdly, the trust, of which the common law takes no notice, but which carries the beneficial interest and profits in a court of equity, and is still a creature of that court, as the use was before the statute (*n*)."

This newly-created interest was held to be so perfectly

(*l*) Lit. s. 462, 463; Co. Lit. Atk. 591.

272. b.; and see Carter, 197; *Povey v. Jaxon*, Nels. 135; *Megod's case*, Godb. 64. (n) *Willet v. Sandford*, 1 Ves. 186; *Coryton v. Helyar*, 2 Cox, 342.

(m) See *Hopkins v. Hopkins*, 1

distinct from the ancient use, that the statutory provisions, by which many of the mischiefs of uses had been remedied, as the 19 Hen. 7, c. 15, by which uses had been made liable to writs of execution, and the 26 Hen. 8, c. 13, by which they had become forfeitable to the Crown for treason, were decided to have no application (3). However, the trust took the likeness of the use, assimilating itself to the nature of special trusts and trusts of chattels, which had never been disturbed by any legislative enactment.

To show how the principles of uses prevailed after the statute of Hen. 8, it was held in the reign of Elizabeth (o), that the equitable term of a *feme covert* did not vest in the husband by survivorship; for a trust, it was said, was a thing in privity, and in nature of an action, and no remedy for it but by writ of *subpœna*. And a few years after in the same reign it was resolved by all the Judges that a trust was a matter of privity and in nature of a *chose in action*, and therefore was not assignable (p). And in the sixth year of King Charles the First it was decided by the Judges, that, as a feme was dowerable by act or rule of law, and a court of equity had no jurisdiction where there was not fraud or covin, the widow of a trustee was entitled to her dower out of the trust estate (q).

(o) *Witham's case*, 4 Inst. 87; Inst. 86.

S. C. Popham, 106, *sub nomine* (q) *Nash v. Preston*, Cro. Car. Johnson's case. 190.

(p) *Sir Mowl Finch's case*, 4

(3) As the statutes relating to uses have never been repealed, but are merely inoperative from the want of any subject matter, the question suggests itself whether they be not still applicable to a use created by a bargain and sale not by indenture, or by indenture not duly inrolled; for as the 27 Hen. 8, c. 10, is prevented from transferring the possession, the old common law use seems in this case to survive. See Shepp. Touch. 508.

But during the reigns of Charles the First and Second, and particularly during the Chancellorship of Lord Nottingham, who, from the sound and comprehensive principles upon which he administered trusts, has been called the father of equity (*r*), the courts gradually threw off the fetters of uses, and, disregarding the operation of mere technical rules, proceeded to establish trusts upon the broad foundation of conformity to the course of common law. "In my opinion," said Lord Mansfield, "trusts were not on a true foundation till Lord Nottingham held the great seal; but by steadily pursuing from plain principles trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has since been raised; so that trusts are now made to answer the exigencies of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Hen. 8 meant to avoid (*s*)."

To point out the changes that were successively introduced, it was held *with reference to the trustee*, that *actual confidence in the person* was no longer to be looked upon as essential. A body corporate therefore was not exempted from the writ of *subpœna* on the ground of incapacity (*t*), and even the king, notwithstanding his high prerogative, was invested with the character of a Royal Trustee (*x*), though the precise mode of enforcing the trust against him was not exactly ascertained: to use the language of Lord Northington, "the arms of equity were very short against the Preroga-

(*r*) *Philips v. Brydges*, 3 Ves. Ves. 468; *Attorney General v. 127*; *Kemp v. Kemp*, 5 Ves. 858. *Whorwood*, 1 Ves. 536.

(*s*) *Burgess v. Wheate*, 1 Ed. (*x*) See *Penn v. Lord Baltimore*, 223. 1 Ves. 453; *Earl of Kildare v.*

(*t*) See *Green v. Rutherworth*, 1 *Eustace*, 1 Vern. 439.

tive" (*y*). The subtle distinctions which had formerly attended the notion of *privity of estate* were also gradually discarded. Thus it was laid down by Lord Hale, that tenant in dower should be bound by a trust as claiming in the *per* by the assignment of the heir (*z*); and so it was afterwards determined by Lord Nottingham (*a*): and when an old case to the contrary was cited before Lord Jeffries, it was unanimously declared both by the bench and the bar to be against equity and the constant practice of the court (*b*). A tenant by statute merchant was held to be bound upon the same principle, for he took, it was said, by the act of the party, and the remedy which the law gave thereupon (*c*). But as to tenant by the curtesy, Lord Hale gave his opinion, that one in the *post* should not be liable to a trust *without express mention made by the party who created it*; and therefore tenant by the curtesy should not be bound (*d*): but his Lordship's authority on this point was subsequently overruled, and curtesy as well as dower was made conformable to the general principle.

With respect to the *cestui que trust*, or the person entitled to the *subpœna*, the narrow doctrine contained under the technical expression of privity began equally to be waived, or rather to be applied with considerable latitude of construction. "The equitable interest," said Justice Rolle, "is not a thing in action, but an inheritance or chattel, as the case may fall out" (*e*); and when once the trust, instead of passing as a *chose in action*, came to

(*y*) *Burgess v. Wheate*, 1 Ed. in the copy of Croke's Reports in
256. Lincoln's Inn Library. Cro. Car. 191.

(*z*) *Powlett v. Attorney General*, (*c*) *Powlett v. Attorney General*,
Hard. 469. Hard. 467, *per* Lord Hale.

(*a*) *Noel v. Jevon*, Freem. 43. (*d*) S. C. Ib. 469.

(*b*) MS. note by an old hand (*e*) *King v. Holland*, Styl. 21.

be treated on the footing of an actual estate, it soon drew to it all the rights and incidents that accompanied property at law: thus, the equity of the *cestui que trust*, though a bare contingency or possibility (*f*), was admitted to be assignable (*g*); and *Witham's case*, that a husband who survived his wife could not, for want of privity, claim her equitable chattel, was declared by the court to be no longer an authority (*h*). So a judgment creditor, it was held by Lord Nottingham, might prosecute an equitable *fieri facias* (*i*); and though Lord Keeper Bridgman refused to allow an equitable *elegit* (*k*), it is probable, had the question arisen before Lord Nottingham, his Lordship would in this, as in other cases, have acted on a more liberal principle; at all events, the creditor's right to relief in this case has since been established by the current of modern authority (*l*). Again, a trust was decided by Lord Nottingham to be assets in the hands of the heir (*m*); and though Lord Guildford afterwards overruled this decision (*n*), yet Lord Nottingham's view of the subject appears to have been eventually successful (*o*). Curtesy also was permitted of a trust estate, though the widow of *cestui que trust* could never establish her title to dower (*p*). "Not," said Lord Mansfield, "on reason or principle, but because wrong determinations had misled in too many instances to be then set right (*q*)"; or rather,

(*f*) *Warmstrey v. Tanfield*, 1 Ch. Re. 29; *Lord Cornbury v. Middleton*, 1 Ch. Ca. 208; *Goring v. Bickerstaff*, 1 Ch. Ca. 8.

(*g*) *Courthope v. Heyman*, Cart. 25, per Lord Bridgman.

(*h*) *King v. Holland*, Al. 15.

(*i*) *Anon. case*, cited *Balsh v. Wastall*, 1 P. W. 445; *Pit v. Hunt*, 2 Ch. Ca. 73.

(*k*) *Pratt v. Colt*, Freem. 139.

(*l*) See *infra*.

(*m*) *Grey v. Colville*, 2 Ch. Re. 143.

(*n*) *Creed v. Covile*, 1 Vern. 172.

(*o*) See *infra*.

(*p*) *Colt v. Colt*, 1 Ch. Re. 254.

(*q*) *Burgess v. Wheate*, 1 Ed. 224.

as Lord Redesdale thought, because the admission of dower would have occasioned great inconvenience to purchasers—a mischief that in the case of curtesy was not equally to be apprehended (r).

Lord Mansfield was for carrying the analogy of trusts to legal estates beyond the legitimate boundary. “A use or trust,” he said, “was heretofore understood to be merely as an agreement, by which the trustee and all claiming from him in privity were personally liable to the *cestui que use*, and all claiming under him in like privity; nobody in the *post* was entitled under or bound by the agreement: but now the trust in this court is the same as the *land*; and the trustee is considered merely as an instrument of conveyance (s).” And in the application of this principle his Lordship argued, that the estate of the *cestui que trust* ought to be subject to escheat, and that, on failure of heirs of the trustee, the lord who took by escheat should be bound by the trust. But to these propositions the courts of equity have never assented. The limit to which the analogy of trusts to legal estates ought properly to be allowed, was well enunciated by Lord Northington in the case of *Burgess v. Wheate*. “It is true,” he said, “this Court has considered trusts *as between the trustee, cestui que trust, and those claiming under them*, as imitating the possession; but it would be a bold stride, and in my opinion a dangerous conclusion, to say therefore this Court has considered the creation and instrument of trust as a mere nullity, and the estate in all respects the same as if it still continued in the seisin of the creator of the trust, or the person entitled to it: for my own part *I know no instance where this Court has permitted the creation of the trust to affect the*

(r) See *infra*.

(s) *Burgess v. Wheate*, 1 Ed. 226.

right of a third person (t);" that is, to illustrate the principle by particular cases, a tenant by the curtesy, or in dower, or by elegit, as claiming through the *cestui que trust* or trustee, though in the *post*, is bound by and may take advantage of the trust; but the lord, who comes in by escheat, is not in any sense a privy to the trust, and therefore can neither reap a benefit from it on failure of heirs of the *cestui que trust*, nor is bound by the equity on failure of heirs of the trustee.

To the extent therefore pointed out by Lord Northington, and no farther, the analogy of trusts to legal estates is at the present day to be applied.

(t) *Burgess v. Wheate*, 1 Ed. 250, 251.

CHAPTER I.

THE DEFINITION OF A TRUST.

A TRUST cannot be more exactly defined than in the terms employed by Lord Coke for the definition of a use (a), viz. *A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which cestui que use has no remedy but by subpoena in Chancery* (b).

1. It is a *confidence*; not necessarily a confidence expressly reposed by one party in another, for it may be raised by implication of law; nor need the trustee of the estate be *actually* capable of confidence, for the capacity itself may be supplied by legal fiction, as where the administration of the trust is committed to a body corporate; but a trust is a confidence, as distinguished from *jus in re* and *jus ad rem*, for it is neither a legal property, nor is it a legal right to property.

2. It is a confidence *reposed in some other*; not in some other than the author of the trust, for a person may convert himself into a trustee, but in some other than the *cestui que trust*; for as a man cannot sue a

(a) *Burgess v. Wheate*, 1 Ed. Lord Hardwicke.
248, per Lord Keeper Henley; (b) Co. Lit. 272. b.
Lloyd v. Spillet, 2 Atk. 150, per

subpoena against himself, he cannot be said to hold upon trust for himself (c). If the legal and equitable interests happen to meet in the same person, the equitable is for ever absorbed in the legal; as if A. die seised of the legal estate *ex parte paternā*, and of the equitable *ex parte maternā*, the heir of the maternal line has no equity against the heir of the paternal (d).

But the rule holds only where the legal and equitable estates are co-extensive and commensurate; for if a person be seised of the legal estate in fee, and have only a partial equitable interest, to merge the one in the other might lead to a violation of rights; as if lands be conveyed to A. and his heirs, in trust for B. in tail, with remainder to A. in fee, should the equitable remainder limited to A. be converted into a legal estate, it would not be barrable by B.'s equitable recovery (e). Lord Alvanley upon this case observed—"The objection to the recovery is, that at the time it was suffered the remainder in A. was not an equitable, but a legal remainder; and therefore, according to the doctrine established in this Court that in order to make a good equitable recovery the remainders must be equitable, the recovery is void as to him. It was maintained, that where there is in the same person a legal and equitable interest, the former absorbs the latter. I admit that where he has the same interest in both, he ceases to have the equitable

(c) *Goodright v. Wells*, Doug. 747, *per* Lord Mansfield.

(d) *Selby v. Alston*, 3 Ves. 339; *Goodright v. Wells*, Doug. 747, *per* Lord Mansfield; *Wade v. Paget*, 1 B. C. C. 363; *S. C.* 1 Cox, 74; *Philips v. Brydges*, 3 Ves. 126, *per* Lord Alvanley; *Finch's case*, 4 Inst. 85, 3rd re-

solution; *Harmood v. Oglander*, 8 Ves. 127, *per* Lord Eldon.

(e) *Philips v. Brydges*, 3 Ves. 120; *Robinson v. Cummings*, Rep. t. Talb. 164; *S. C.* 1 Atk. 473; and see *Boteler v. Allington*, 1 B. C. C. 72; *Merest v. James*, 6 Mad. 118.

estate, and has the legal estate, upon which the Court will not act, but leaves it to the rules of law; but I do not by any means admit, that, where he has the whole legal estate and a partial equitable estate, the latter sinks into the former. It has been very ably argued, that there seems an absurdity in saying he had an equitable remainder for himself, where he had the whole legal fee; but it is much more absurd to say, he had a legal remainder. It is impossible—it would be a solecism—to state to a lawyer that he could have an estate in fee with a remainder in tail expectant in law upon it; but there is no such absurdity in saying he might have the whole legal estate, and a limited interest in the beneficial interest of that estate. When I am told that legal and equitable estates cannot subsist in the same person, it must be understood always with this restriction—that it is the same estate in law and in equity; for then there is no person upon whom the Court can act—the equitable estate is absorbed—the better phrase is, that it no longer exists: but when for the purposes of justice it is necessary it should exist, that circumstance shall not put a party entitled into a worse condition (f).”

In the case of a mortgage in fee it is said, a man and his heirs are trustees for himself and his executors (g); but the meaning is no more than this, that, until a release, or foreclosure of the equity of redemption, the interest of the mortgagee is of the nature of personalty, and passes on his death to his personal representative; the heir, therefore, takes the estate upon trust for the executor; a release or foreclosure, unless it happen in the lifetime of the mortgagee, comes too late after his

(f) *Philips v. Brydges*, 3 Ves.
125—127.

(g) *Kendal v. Micfield*, Barn.
50, per Lord Hardwicke.

decease to alter the character of the property, for, *as the tree falls, so it must lie* (h) (4).

3. A trust is *not issuing out of the land, but as a thing collateral to it*. A legal charge, as a rent, issues directly out of the land itself, and therefore binds every person, whether in the *per* or *post*, whether a purchaser for valuable consideration or volunteer, whether with notice or without; but a trust is not part of the land, but an incident made to accompany it, and that not inseparably, but during the continuance only of certain indispensable adjuncts; for—

4. A trust is *annexed in privity to the estate*, that is, must stand or fall with the interest of the person by whom the trust is created; as, if tenant for life declare a trust in fee, the determination of the life estate must put an end to the trust. And so, if lands be limited to A. and his heirs, with a springing use to B. and his heirs, a trust declared by A. must necessarily expire with the shifting of the use to B. And if the trustee die and leave no heir, the lord who takes by escheat is not a privy to the estate upon which the trust was ingrafted, and therefore will not be bound by it, but will hold beneficially. And upon the same principle, if the trustee be disseised, the tortious fee is adverse to that impressed with the trust, and therefore the equitable owner cannot

(h) *Canning v. Hicks*, 2 Ch. Ca. *Bowyer*, 2 Vern. 66; *Gobe v. 187*; *S. C.* 1 Vern. 412; *Tabor Earl of Carlisle*, cited *Ib.*; *Wood v. Grover*, 2 Vern. 367; *S. C.* 1 *Nosworthy*, cited *Audley v. Audley*, 2 Vern. 193. *Eq. Ca. Ab.* 328; *Clerkson v.*

(4) But if the heir foreclose, or obtain a release of the equity of redemption, he may keep the estate, and pay the executor the debt only. *Clerkson v. Bowyer*, 2 Vern. 67, *per Cur.*

sue the disseisor in Chancery, but must bring an action against him at law in the name of the trustee (i).

During the system of uses, and also while trusts were in their infancy, the notion of privity of estate was not extended to tenant by the curtesy, or in dower, or by *elegit*, or in fact to any person claiming by operation of law, though through the trustee; but in this respect the landmarks have since been carried forward, and at the present day a trust follows the estate into the hands of every one claiming under the trustee, whether in the *per* or *post*. A lord by escheat and a disseisor are the only persons not bound: the lord, because he claims by title paramount; a disseisor, because his possession is adverse.

5. A trust is *annexed in privity to the person*. To entitle the *cestui que trust* to relief in equity, it is not only necessary he should prove the creation of the trust, and the continuance of the estate supporting it, but should also make it clear that the assign is personally privy to the equity, and therefore amenable to the *sub-pœna*. If it can be shown that the assign had actual notice, then, whether he paid a valuable consideration or not, he is plainly privy to the trust, and bound to give it effect; but if actual notice cannot be proved, then, if he be a volunteer, the Court will affect him with notice by presumption of law; but if he be a purchaser, the Court must believe, that, having paid the full value of the estate, he was ignorant, at the time he purchased, of another's equitable title. A purchaser for valuable consideration without notice is therefore the only assign against whom privity annexed to the person cannot at the present day be charged.

(i) *Finch's case*, 4 Inst. 85, Uses, edited by Sir E. Sugden, p. 1st resolution; and see Gilbert on 429, note 6.

6. *Cestui que trust has no remedy but by subpoena in Chancery*; and by Chancery must be understood, not exclusively the court of the Lord Chancellor, but any court invested with an equitable jurisdiction, as opposed to common law courts (*k*) and spiritual courts (*l*), neither of which have any cognisance in matters of trust. A common law court could never indeed, from the defective nature of its proceedings, have specifically enforced a trust; but at one time it affected to punish a trustee in damages for breach of the implied contract (*m*): an exercise of authority, however, clearly extra-provincial, and long since abandoned (*n*). Should a spiritual court attempt to meddle with a trust, the Court of King's Bench might be moved to issue a prohibition (*o*).

(*k*) *Sturt v. Mellish*, 2 Atk. 612, *per* Lord Hardwicke; *Allen v. Imlett*, F. L. Holt's Rep. 641; *Holland's case*, Styl. 41, *per* Rolle, J.

Lord Jeffries; and see 1 Eq. Ca. Ab. 384, D. (*a*).

(*l*) *Miller's case*, 1 Freem. 283; *King v. Jenkins*, 3 Dowl. & Ryl. 41; *Farrington v. Knightly*, 1 P. W. 549, *per* Lord Parker; *Edwards v. Graves*, Hob. 265; *Witter v. Witter*, 3 P. W. 102, *per* Lord King.

(*n*) *Barnardiston v. Soame*, 7 State Trials, 443, Harg. ed. *per* Chief Justice North; *Sturt v. Mellish*, 2 Atk. 612, *per* Lord Hardwicke; *Holland's case*, Styl. 41, *per* Rolle, J.; *Allen v. Imlett*, F. L. Holt's Rep. 14.

(*m*) *Mego's case*, Godb. 64; *Jevon v. Bush*, 1 Vern. 344, *per*

(*o*) *Petit v. Smith*, 1 P. W. 7; *Edwards v. Freeman*, 2 P. W. 441, *per* Sir J. Jekyll; *Barker v. May*, 4 M. & R. 386.

CHAPTER II.

THE DIFFERENT KINDS OF TRUSTS.

THE first and natural division of trusts is into simple and special.

The simple trust corresponds with the ancient use, and is where property is simply vested in one person upon trust for another, and the nature of the trust, not being qualified by the settlor, is left to the construction of law.

The special trust is where a trustee is interposed for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depository of the estate, but is bound to exert himself actively in the execution of the settlor's intention ; as where the conveyance to trustees is upon trust to reconvey, or to sell for payment of debts.

Special trusts have again been subdivided into ministerial or instrumental and discretionary. The former, such as demand no further exercise of reason or understanding than every intelligent agent must necessarily employ ; the latter, such as cannot be duly administered without the application of a certain degree of prudence and judgment.

A trust to convey an estate must be regarded as ministerial ; for, provided the *cestui que trust* be put in possession of the estate, it is perfectly immaterial to him by whom the conveyance was executed.

Mr. Fearné was of opinion, that even a trust for sale should be considered as ministerial, “for the price, he said, is not arbitrary, or at the trustee’s discretion, but to be the best that can be gotten for the estate, which is a fact to be ascertained independently of any discretion in the trustee (a).”

A fund in trustees upon trust to distribute among such charitable objects as the trustees shall think fit (b), or an advowson conveyed to them upon trust to elect and present a proper preacher (c), is clearly discretionary; for the selection of the most deserving objects in the first instance, and the choice of the best candidate in the second, is a matter calling for serious deliberation, and not to be determined upon without due regard to the merits of the parties, and all the particular circumstances of the case.

A trust such as to distribute at the discretion of the trustees is frequently designated in the books as *a mixture of trust and power* (d), that is, a trust of which the outline was sketched by the settlor, but of which the full measure was left to be filled up at the discretion of the trustees. The exercise of such a power is imperative, while the mode of its execution is matter of judgment and arbitrary.

A mixture of trust and power is not to be confounded with a common trust to which a power is annexed; for, in the latter case, the trust itself is complete, and the power being but an accessory, may be exercised or not as the trustee may deem it expedient; as where lands

(a) F. P. W. 313.

(c) *Attorney-General v. Scott*, 1

(b) *Attorney-General v. Gleg*, 1 Ves. 413; *Potter v. Chapman*, Atk. 356; *Hibbard v. Lambe*, Amb. 98.

Amb. 309; *Cole v. Wade*, 16 Ves. 43; (d) *Cole v. Wade*, 16 Ves. 43; Ves. 27; *Gower v. Mainwaring*, *Gower v. Mainwaring*, 2 Ves. 89. 2 Ves. 87.

are limited to trustees with an authority to grant leases, or stock is transferred into the names of trustees with a power of varying the securities: for in such cases the power forms no integral part of the trust, but is merely collateral and subsidiary, and the execution of it, in the absence of fraud, cannot be compelled by application to the Court.

CHAPTER III.

WHO MAY DECLARE A TRUST.

AS the trust is in equity the *bonâ fide* and substantial ownership, the capacity of declaring a trust must be measured by the capacity of disposing of the interest at law.

A *feme covert* cannot declare a trust, except with the formalities required by the late Fines and Recoveries Act.

If an infant before that statute had levied a fine or suffered a recovery, he might also have declared the uses (a), and, unless the fine or recovery had been reversed by him during his nonage, he had been bound by the declaration (b): but now that deeds have been substituted for fines and recoveries, an infant cannot bind himself in any case; for the deed of an infant is not obligatory upon him, but may be avoided at any time. However, if the assurance of the infant be voidable only and not void, it seems the trust will hold good, until the legal estate be defeated.

As an infant may by the custom of Kent enfeoff for valuable consideration at the age of fifteen, a trust declared upon such a feoffment would, if we follow the analogy of uses, be supported in equity (c). And of course an infant of the age of fourteen may declare a trust of personal estate by will.

(a) Gilb. on Uses, 41, 245, 250. (b) Id. 246. (c) Id. 250.

The deed of a lunatic or idiot is *ipso facto* void, but his feoffment is voidable only (*d*); and therefore a declaration of trust founded on a feoffment would, it seems, be valid until the avoidance of the estate.

The King might have declared a use, but not otherwise than by letters patent (*e*); and in a case before Lord Thurlow, where the plaintiff attempted to establish a trust against the Crown by parol, his Lordship after some consideration dismissed the bill, and apparently on the ground that parol evidence was inadmissible (*f*).

(*d*) See Treatise of Powers, c. 7, s. 1.

(*f*) *Fordyce v. Willis*, 3 B. C. C. 577.

(*e*) Bacon on Uses, 66.

CHAPTER IV.

OF THE FORMALITIES REQUISITE TO BE OBSERVED IN
THE CREATION OF TRUSTS.

UPON this subject we shall consider the nature of trusts, first, as they stood at common law, and, secondly, as they are affected by the Statute of Frauds.

I. Of the common law.

Trusts, like uses, are of their own nature averrable (a); as, if before the Statute of Frauds an estate had been conveyed unto and to the use of A. and his heirs, a trust might have been raised by parol in favour of B. (b); and, since the statute, though in respect of lands a trust cannot be declared by mere parol, no other formality is requisite than a simple note in writing not under seal (c).

But the Court, following the analogy of uses, will not permit averment of a trust in contradiction to any expression of intention on the face of the instrument itself (d): as, if a chattel personal be assigned to A. “for

(a) See *Fordyce v. Willis*, 3 B. C. C. 587.
 B. C. C. 587; *Benbow v. Townsend*, 1 M. & K. 506; *Bagley v. Boulcott*, 4 Russ. 347; *Crabb v. Crabb*, 1 M. & K. 511; *Kilpin v. Kilpin*, Id. 520.
 (b) See *Bellasis v. Compton*, 2 Vern. 294; *Fordyce v. Willis*, 3 B. C. C. 587.
 (c) *Adlington v. Cann*, 3 Atk. 151, per Lord Hardwicke; *Boson v. Statham*, 1 Ed. 513, per Lord Keeper Henley.
 (d) *Lewis v. Lewis*, 2 Ch. Rep. 77; *Finch's case*, 4 Inst. 86; *Fordyce v. Willis*, 3 B. C. C. 587.

his own use and benefit," the interest cannot be wrested from him, though a mere volunteer, by averment of a trust in favor of a stranger (*e*).

Nor is it necessary, that the beneficial ownership should be conferred upon the grantee expressly, for averment will be equally excluded, if, from the nature of the instrument, or any circumstance of evidence appearing on the face of it, an intention to that effect can be clearly implied. Thus a trust cannot be averred, where a valuable consideration is paid (*f*); and if a pension from the Crown be granted to A., a trust cannot be raised by parol in favour of B.; for a pension is conferred upon motives of honour, and the inducements to the bounty are the personal merits of the annuitant (*g*).

And it was a principle of uses, that, on a feoffment, which could be made by parol, a use might be declared by parol; but where a deed was necessary for passing the legal estate, there the use which was ingrafted could not be raised by averment (*h*). As trusts have been modelled after the likeness of the use (*i*), the distinction is at the present day entitled to respect. And indeed it is laid down by Duke expressly, that, where the things given may pass without deed, there a charitable use may be averred by witnesses; but, where the things cannot pass without deed, there charitable uses cannot be averred without a deed proving the use (*k*). And Lord Thurlow, it is probable, alluded to the same distinction when he

(*e*) See Mr. Wilbraham's argument in *Adlington v. Cann*, 3 Atk. 145, approved by Lord Hardwicke, *Ib.* 151.

(*f*) See Gilb. on Uses, 51, 57.

(*g*) *Fordyce v. Willis*, 3 B. C. C. 567.

(*h*) Gilb. on Uses, 270.

(*i*) See *Fordyce v. Willis*, 3

B. C. C. 587; *Lloyd v. Spillet*, 2 Atk. 150; *Attorney-General v. Lockley*, Append. to Vend. and Purch. No. 17; *Chaplin v. Chaplin*, 3 P. W. 234; *Attorney-General v. Scott*, Rep. t. Talb. 139; *Burgess v. Wheate*, 1 Ed. 195, 217, 248.

(*k*) Duke, 141.

observed, "I have been accustomed to consider uses as averrable, but perhaps, when looked into, the cases may relate to feoffment, not to conveyances by bargain and sale, or lease and release (l)."

II. Of the Statute of Frauds.

By the seventh section it is enacted, that "all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Upon the subject of this enactment we shall first briefly point out what interests are within the act, and secondly what formalities are requisite to be observed.

1. Of the interests within the act.

It is perfectly clear, that the words "lands, tenements, and hereditaments," cannot include chattels personal (m), but unquestionably they comprise chattels real (n). And there can be no ground for exempting copyholds from the operation of this clause; for, as a trust is ingrafted on the estate of the copyholder, the rights of the lord, who claims by title paramount, cannot in any way be injuriously affected (o).

(l) *Fordyce v. Willis*, 3 B. C. C. 587.

(m) *Bayley v. Boulcott*, 4 Russ. 347, per Sir J. Leach; *Fordyce v. Willis*, 3 B. C. C. 587, per Lord Thurlow; *Bendow v. Townsend*, 1 M. & K. 510, per Sir J. Leach; *Fane v. Fane*, 1 Vern. 31, per Lord Nottingham; *Nab v. Nab*, 10 Mod. 404. But this case, as reported 1 Eq. Ca. Ab. 404, appears an authority the other way.

(n) *Skett v. Whitmore*, Freem. 280; *Forster v. Hale*, 3 Ves. 696; *Riddle v. Emerson*, 1 Vern. 108; and see *Hutchins v. Lee*, 1 Atk. 447; *Bellasis v. Compton*, 2 Vern. 294.

(o) See *Withers v. Withers*, Amb. 151; *Goodright v. Hodges*, 1 Watk. on Cop. 227; *S. C. Loft*, 230; *Acherley v. Acherley*, 7 B. P. C. 273; but see *Devenish v. Baines*, Pr. Ch. 5.

Mr. Hargrave seems to have thought, that even the uses of a surrender were trusts within the intention of the act ; for, in a note to Coke on Littleton he observes "a nuncupative will of copyholds was a valid declaration of the uses, where the surrender was silent as to the form, till the 29 Car. 2 required all declarations of trusts to be in writing (5)." But the surrender of a copyhold to uses is merely a direction to the lord in what manner to regrant the estate, and the surrenderee is a *cestui que use* by misnomer only, and not in fact ; and indeed the Court of King's Bench has expressly decided that uses of copyholds are not within the Statute of Frauds, on the ground that a surrender to uses is not the creation of a trust or confidence apart from the legal estate, but a mode established by custom of transferring the legal estate itself (*p*).

An attempt was formerly made to have a charitable use excepted from the clause of the statute against parol declarations, but Lord Talbot decreed (*q*), and Lord Hardwicke affirmed the decision (*r*), and Lord Northington said every man of sense must subscribe to it (*s*), that a gift to a charity must be treated on the same footing with any other disposition.

In *Lady Portington's case* (*t*) it was held by the Court of King's Bench, that the King was bound by the Statute of Frauds, and therefore was not at liberty to prove a superstitious use by parol ; but in the Court of Exchequer it was ruled, on the contrary, that the Statute

(*p*) *Doe v. Danvers*, 7 East, 299. *Cann*, 3 Atk. 150.

(*q*) *Loyd v. Spillet*, 3 P. W. 344. (*s*) *Boson v. Statham*, 1 Ed. 513.

(*r*) *S. C.* 2 Atk. 148 ; *S. C.* (*t*) *King v. Portington*, 1 Salk. Barn. 384 ; and see *Adlington v.* 162.

(5) Mr. Watkins argues, and apparently both on principle and authority (see *Devenish v. Baines*, Pr. Ch. 3), that a nuncupative will of copyholds is even at the present day valid. 1 Wat. Cop. 130.

of Frauds did not bind the King, but took place only between party and party. Lord Hardwicke has since expressed himself doubtful of the latter doctrine, that the King is not bound by a statute unless he be specially named; at the same time, however, mentioning a case in which that doctrine had been followed (*u*).

2. Of the formalities required by the statute in the creation of trusts.

The principal point demanding our attention is, that trusts are not necessarily to be *declared* in writing, but only to be *manifested and proved* by writing; for, if there be written evidence of the existence of such a trust, the danger of parol declarations, against which the statute was directed, is effectually removed (*x*). It may be doubted whether the act did not intend that the declaration itself should be in writing; for the ninth section enacts, that "all grants and assignments of any trust or confidence shall *likewise be in writing*, signed by the party granting or assigning the same, or by such last will or devise;" but, whatever may have been the actual intention of the legislature, the construction put upon the clause in practice is now firmly established.

The statute will therefore be satisfied, if the trust can be manifested by any subsequent acknowledgment of the trustee, however informally or indirectly made, as by a letter under his hand (*y*), by his answer in Chancery (*z*), or by a recital in a deed (*a*), &c.

But with regard to letters, and loose acknowledgements of that kind, the Court expects demonstration that

(*u*) *Addington v. Cann*, 3 Atk. 288; *Nab v. Nab*, 10 Mod. 404; 154. *Cottingham v. Fletcher*, 2 Atk. 155;

(*x*) *Forster v. Hale*, 3 Ves. 707, *Ryall v. Ryall*, 1 Atk. 59, *per* Lord Alvanley. Lord Hardwicke.

(*y*) *Forster v. Hale*, 3 Ves. 696. (*a*) *Deg v. Deg*, 2 P. W. 412.

(*z*) *Hampton v. Spencer*, 2 Vern.

they relate to the subject matter (*b*); nor will the trust be executed if the precise nature of the trust cannot be ascertained (*c*); and if the trust be established on the answer of the trustee, the terms of it must be regulated by the whole answer as it stands, and not be taken from one part of the answer to the rejection of another (*d*).

It will be observed, that the words of the statute require the writing to be *signed*; and not only the fact of the trust, but also the particular terms of it, must be supported by evidence under signature (*e*); but, as in the analogous case of agreements under the fourth section of the act (*f*), the terms of the trust may be collected from a paper not signed, provided such paper can be clearly connected with, and is referred to by, the writing that is signed (*g*).

The enactments of the Statute of Frauds relating to devises and bequests, have also indirectly an effect upon the creation of trusts. As the act declares that a will of freeholds shall be signed and attested, and a will of personal estate shall be executed in writing, it follows that a trust of realty or personalty cannot be created by testamentary disposition without the observance of the same respective solemnities. The absolute owner of property combines in himself both the legal and equitable interests; and when the legislature enacts that no devise or bequest of property shall be valid without certain ceremonies, a testator cannot by an informal instrument affect the equitable any more than the legal estate, for the one is

(*b*) *Forster v. Hale*, 3 Ves. 708,
per Lord Alvanley.

(*c*) *Forster v. Hale*, 3 Ves. 707,
per Lord Alvanley.

(*d*) *Hampton v. Spencer*, 2 Vern.
288; *Nab v. Nab*, 10 Mod. 404.

(*e*) *Forster v. Hale*, 3 Ves. 707,
per Lord Alvanley.

(*f*) See Vend. and Purch. ch. 3,
s. 2.

(*g*) *Forster v. Hale*, 3 Ves. 696.

a constituent part of the ownership as much as the other. Thus, a person cannot, but by a will duly signed and attested, give a sum of money originally and primarily out of land; for the charge is considered as part of the land, and is to be raised out of it by sale or mortgage (*h*). And if a testator by will duly signed and attested give lands to A. and his heirs upon trust, but do not specify the particular trust intended, and then by a paper informally executed declare a trust in favour of B., the interest, which resulted under the first will, and would have descended to the heir, is still a part of the original ownership, and therefore cannot be passed without the forms prescribed by the statute (*i*). So, if a legacy be bequeathed to A. upon trust, and the testator by parol give the equitable interest to B., such a direction is in fact a testamentary disposition of an interest in the chattel, and therefore void by the statute which imposes the necessity of a written will. But it will be said that such expressions of intention, though void as devises or bequests, are yet good as declarations of trust, and therefore, where the legal estate of freeholds is well devised, a trust may be ingrafted upon it by a simple note in writing; and where a chattel personal is well bequeathed, a trust of it, as being excepted from the Statute of Frauds, may be raised by a mere parol declaration: but this argument assumes that such directions by a testator stand on the same footing as acts *inter vivos*, whereas it has long ago been decided by the case of *Habergham v. Vincent* (*k*), that they are in truth of a testamentary character. "It is taken for granted," said Lord Loughborough, "that there is a deed to take effect from the time of execution; but the deed

(*h*) See *Brudenell v. Boughton*, 2 Atk. 151, per Lord Hardwicke. Atk. 272.

(*k*) 2 Ves. jun. 204.

(*i*) See *Addington v. Cann*, 3

is built on the will. If the will was destroyed, the deed I should consider absolutely gone. The will without the deed is incomplete, and the deed without the will is a nullity (*l*).” And Mr. Justice Buller observed, “A deed must take place upon its execution or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place, as passing the interest to be conveyed, at the execution; but a will is quite the reverse, and can only operate after death (*m*).” If such declarations are to be regarded therefore as testamentary, it follows *ex necessitate*, that, whether relative to real or personal estate, they must be executed according to the Statute of Frauds.

The averment of a trust upon a will offends also against another principle. A devise, as was resolved in *Vernon's case*, implies a consideration, and therefore cannot be averred to the use of another (*n*); for *that*, observes Lord Chief Baron Gilbert, were an averment contrary to the design of the will appearing in the words (*o*); and accordingly in *Lady Portington's case* (*p*), the Court of King's Bench refused to admit evidence against the devisees, both from the Statute of Frauds, and also *from the nature of the thing*. It is laid down, indeed, by Jenkins, that an averment *might* be at common law upon a will, though it was in writing; but his only authority in support of this position is a case that he has evidently mistaken. “A devise,” he says, (by the custom of London before the Statute of Wills) “was to A., B., and C., and that A. should have all the profits during his life. Upon a suit in Chancery by the heir of A., the trust of this land was averred to be re-

(*l*) *S. C.* Id. 209.

(*o*) *Gilb. on Uses*, 162.

(*m*) *S. C.* Id. 230.

(*p*) 1 *Salk.* 162.

(*n*) 4 *Rep.* 4 a.

posed in the said A., B., and C., to the use of A. and his heirs; and it was so proved. The Chancellor made a decree, by the advice of the judges, that, A. being dead, his heir should have the land (q).” But the case, as stated by Fitzherbert (r), from whom it is cited by Jenkins, involved a very different question. A citizen of London had devised to his son and three others, and his will was that one of the three should have the profits for life. The *cestui que trust* for life died, and the heir (viz. of the testator and not of the *cestui que trust*) filed his bill in Chancery as entitled to the resulting interest, and prayed a conveyance. It was argued for the trustees, that in a *feoffment* the use would have resulted; but in a *will* the devisees were intended to take every beneficial interest, that was not expressly disposed of from them. But the Court refused to recognise the distinction, and decreed a resulting trust to the testator’s heir.

Sir *Orlando Bridgman*, Lord Keeper, directed a trial at law, whether a parol declaration of trust could be established against a person appointed executor by a written will; and the Court determined, that “a trust might arise by parol, or that the executor might be a trustee by the will of the testator, though it was not mentioned in the written will.” But this resolution was before the Statute of Frauds, and therefore when nuncupative wills, without any restrictions upon them, were allowed, either as original wills, or as revoking a former will (s).

In *Fane v. Fane* (t), a testatrix gave her personal estate to her executors, and by a subsequent clause she

(q) Jenk. 3 Cent. Ca. 26.

(r) Fitzherb. Ab. Devise, 22.

(s) *Porey v. Juxon*, Nels. 135.

It appears from this case, that a

trust could have been averred at common law against an executor, though not against a devisee.

(t) 1 Vern. 30.

gave her executors £100 a piece for their care and trouble, and the rest of her personal estate to the children of A. In a question between the executors and the children of A., the Court held, that the latter were the beneficial legatees; and the third ground of the Court's determination is said to have been, that a trust of personal estate might be averred, and one of the executors had sworn that the property was intended for the children. But the case was quite clear upon other grounds, and the very argument used by the Court, that the executor's legal title could be defeated by parol evidence, has long since been overruled (6).

But the principal opposing authority is the uncompromising language of Lord Northington in the case of

(6) The doctrines that eventually prevailed with respect to the admission or rejection of parol evidence may be briefly comprehended under the three following heads:—1st, Where a person was simply appointed executor, which conferred upon him a legal title to the surplus, averment was not admissible to make him a trustee for the next of kin. *Langham v. Sandford*, 19 Ves. 644, *per* Lord Eldon; *White v. Williams*, 3 V. & B. 72; *S. C.* Coop. 58. 2ndly, If from any circumstance appearing on the face of the will, as the gift of a legacy to the executor, the law presumed he was *not* intended to take the surplus beneficially, the executor was at liberty to rebut that presumption by the production of parol evidence (*Walton v. Walton*, 14 Ves. 322, *per* Sir W. Grant), and of course the next of kin might then fortify the presumption by opposing parol evidence in contradiction. But, 3rdly, Where the will itself invested the executor with the character of trustee, as by giving him a legacy "for his trouble," or by styling him a "trustee" expressly, the *prima facie* title to the surplus was then in the next of kin, and parol evidence was not admissible to disprove the express intention. *Rachfield v. Careless*, 2 P. W. 158; *Langham v. Sandford*, 17 Ves. 435; *S. C.* 19 Ves. 641; *Golding v. Yapp*, 5 Mad. 59; *White v. Evans*, 4 Ves. 21; *Walton v. Walton*, 14 Ves. 322, *per* Sir W. Grant.

Now by the late act 1 W. 4, c. 40, an executor is *prima facie* a trustee for the next of kin.

Boson v. Statham (u). "I will speak," said he, "openly, and declare my opinion generally, that a writing signed by the party, who has power to make the trust, declaring a trust upon the will, is good, though such writing be not attested by three witnesses according to the solemnities of the Statute of Frauds. The Statute of Frauds was not meant to prevent persons from taking trust estates, but only to regulate the proof of them."

But this declaration of Lord Northington cannot prevail against the force of principle, and the authority of such illustrious names as Lord Hardwicke (x) and Lord Eldon (y), who have both concurred in the doctrine, that a trust cannot be ingrafted upon a will but by a testamentary paper executed with the requisite formalities.

To assume the point without further discussion, it follows, that, if the legal estate be effectually devised, and the testator leave a declaration of trust not duly attested, the devisee will be the party entitled to the beneficial interest; for the estate was well devised by the will, and the informal declaration of trust cannot be admitted in evidence (z).

If the will itself stamp the devisee with the character of trustee, though the particular trust intended be not declared, then the beneficial interest will result in favour of the testator's heir (a); and parol evidence cannot be heard in support of a contrary intention, for this would

(u) 1 Ed. 514.

(x) *Adlington v. Cann*, 3 Atk. 151.

(y) *Muckleston v. Brown*, 6 Ves. 67; *Stickland v. Aldridge*, 9 Ves. 519; and see *Puleston v. Puleston*, Finch, 312; Jenk. & Cent. Ca. 26.

(z) *Adlington v. Cann*, 3 Atk.

141; and see *Stickland v. Aldridge*, 9 Ves. 519.

(a) *Muckleston v. Brown*, 6 Ves. 52. *Bishop v. Talbot*, as cited, Id. 60, was a devise to trustees "in trust;" but on consulting the Reg. Lib. it appears there was no notice of the trust upon the will. Reg. Lib. 1772, A. fol. 137.

be not to rebut an equitable presumption, but to act upon parol testimony in contradiction to a written instrument (b).

The devisee is not bound to answer the question whether it is not manifest from the will and informal paper, that he was meant to be a trustee, for matters of construction are to be tried by the Court (c); but if he do admit the trust, he will not be allowed to retain to himself the beneficial interest. Thus, in *Bishop v. Talbot* (d), a testator, by will duly attested, gave his real estate to A. and B., in fee, and by a memorandum, signed, but not attested, declared certain charitable trusts. A bill was filed by the heir at law against the devisees, who, by their answer, insisted that the devise was not upon any secret trust, or for other purposes than what appeared on the will, but admitted they had the memorandum in their possession, and submitted the effect thereof to the judgment of the Court. Sir Thomas Sewell is reported to have said—He did not think the principal matter would be the validity of the paper writing; the question was, what would be the effect of the answer supposing there was no paper; admitting there was no trust for charitable purposes, except what was mentioned in the answer, this was a sort of disclaimer upon their part; and the question was, who should have it. And his Honor decreed the heir at law to be entitled to a resulting trust. “Sir Thomas Sewell,” said Lord Eldon, “went a great length in that case. If

(b) See *Langham v. Sanford*, 17 Ves. 442; *S. C.* 19 Ves. 643; *Rackfield v. Careless*, 2 P. W. 158; *Golding v. Yapp*, 5 Mad. 59; *White v. Evans*, 4 Ves. 21; *Walton v. Walton*, 14 Ves. 322.

(c) *Muckleston v. Brown*, 6 Ves. 65, per Lord Eldon.

(d) Cited *Muckleston v. Brown*, 6 Ves. 60, 67. Reg. Lib. A. 1772, fol. 137; A. 1773, fol. 686.

he had said, the law would authorize him to hold the memorandum a sufficient denotation of intention that the devisees should be trustees, the difficulty would be, how he came to read the memorandum. But he took it in another way, that, as they set forth the memorandum, they admitted the purpose of the testator, and put it not upon the effect of the memorandum *vi sua*, if I may so express it, but as taken as their admission. I doubt whether that is quite correct reasoning; but, though Sir Thomas Sewell might be wrong in the fact, that that was an admission, his opinion is an authority in point of law, that, if there was an admission, he would execute the trust. Then it comes to this; that the doctrine of the Court is, that the defendant shall answer in such a case, and if he answers in the affirmative, there is a resulting trust for the heir (*e*)."

The Court will not permit the Statute against Frauds to be converted into an engine of fraud, and therefore if the devise or bequest of the legal estate be accompanied with any *mala fides* in the devisee or legatee, as if there be an express or implied undertaking to execute the intent, the Court will in that case establish the trust, notwithstanding the statute (*f*). "Where," said Lord Eldon, "an estate is suffered to descend, the owner being informed by the heir, that, if the estate is permitted to descend, he will make a provision for the testator's

(*e*) *Muckleston v. Brown*, 6 2 Vern. 506; *Reech v. Kennigate*, Ves. 68. Amb. 67; *S. C.* 1 Ves. 123;

(*f*) *Kingsman v. Kingsman*, 2 *Chamberlain v. Agar*, 2 Ves. & B. Vern. 559; *Podmore v. Gunning*, 259; *Pring v. Pring*, 2 Vern. 99; 5 Sim. 485; *Chamberlaine v. Nab v. Nab*, 10 Mod. 404; *S. C. Chamberlaine*, 2 Eq. Ca. Ab. 43; 1 Eq. Ca. Ab. 404; *Strode v. S. C. Id.* 465; *Thynn v. Thynn*, 1 *Winchester*, 1 Dick. 397; *S. C. Vern.* 296; *Devenish v. Baines*, stated from Reg. Lib., Append. Pr. Ch. 3; *Oldham v. Litchford*, No. I.

mother, wife, or other person, there is no doubt this Court would compel the heir to discover whether he did make such a promise. So, if a father devises to his youngest son, who promises, that, if the estate is devised to him, he will pay 10,000*l.* to the eldest son, this Court would compel the former to discover whether that passed in parol; and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of 10,000*l.*; and then, why, upon a similar principle, should not a trust be raised as to the whole value of the estate, the promise extending to the whole (*g*)?"

And if the testator hold communication with the devisee, who agrees to accept the devise upon such trusts as the testator shall duly declare, but no declaration is ever made, it seems the heir has a right to say, that, as the devisee took in the character of trustee, and the purpose failed, the equitable interest shall result to the heir, not on the ground of intention, but because there was no expression of intention (*h*).

It is not a sufficient answer to a bill for the defendant to say, that the secret trust is not for the plaintiff; for so the devisee makes himself the judge of the title (*i*). And if the defendant deny the trust by his answer, the fact may in this, as in other cases of fraud, be established against him by the production of parol evidence (*k*).

As the Court will interpose to protect the rights of individuals, so *a fortiori*, it will lend its assistance to expose a fraud attempted on the law itself; as, if a testator devise the mere legal estate upon the face of the

(*g*) *Stickland v. Aldridge*, 9 Ves. 519; and see *Muckleston v. Boson v. Statham*, 1 Ed. 514.

Brown, 6 Ves. 69.

(*h*) *Muckleston v. Brown*, 6 Ves. 64, per Lord Eldon.

(*i*) *Newton v. Pelham*, cited

(*k*) *Kingsman v. Kingsman*, 2

Vern. 559; *Pring v. Pring*, 2 Vern. 99.

will, but obtain a promise from the devisee that he will hold upon a trust which public policy has forbidden, the Court will, at the instance of the heir or other person interested, compel an answer from the trustee, whether he took the estate upon such a secret understanding or not (*l*). “Surely,” said Lord Eldon, “the law will not permit secret agreements to evade what upon grounds of public policy is established? Is the Court to feel for individuals, and to oblige persons to discover in particular instances, and not feel for the whole of its own system, and compel a discovery of frauds that go to the roots of that system? There is surely a stronger call upon the justice of the Court to say, upon a private bargain between the testator and those who are to take apparently under the will which is to defeat the whole of the provisions and policy of the law, that they shall be called on to say whether they took the estate, as they legally may not do, for charitable purposes (*m*).”

And where the informal declaration of the testator reposes a discretion in the devisees how much of the estate shall be applied in mortmain, and how much to a lawful trust, the heir of the testator has a right to call upon the devisees to say whether they have exercised that discretion, or mean to do so; and how much they intend to dispose of in a legal mode, and to give him the rest (*n*).

By the Statute of Mortmain (*o*), a devise “in trust or for the benefit of” a charitable use is declared absolutely

(*l*) *Adlington v. Cann*, Bar- Park. 144.
nard, 130; *King v. Lady Porting-*
ton, 1 Salk. 162; *Muckleston v.* (m) *Muckleston v. Brown*, 6
Brown, 6 Ves. 52; *Stickland v.* Ves. 69.
Aldridge, 9 Ves. 516; and see (n) *S. C.* Id. 66, *per* Lord El-
Attorney-General v. Duplessis, don.
 (o) 9 Geo. 2, c. 36.

void, so that even the legal estate does not vest in the devisee. The question therefore suggests itself, whether parol trusts in favour of a charity are void at law by the express words of the statute, or only void in equity and in certain cases upon the ground of fraud against public policy. Lord Hardwicke determined in *Adlington v. Cann* (p), that the Statute of Mortmain did not extend to trusts by parol. "I am of opinion," he said, "that the Statute of Mortmain has not abrogated the Statute of Frauds, which, being made for the public good, ought *normam imponere futuris*. It is true the Statute of Frauds cannot govern the particular provisions of the Statute of Mortmain, but it must govern the construction of subsequent acts; for they must be construed by rules of law, and by what is laid down in precedent acts. If it should be admitted that the Statute of Mortmain took all these cases out of the Statute of Frauds, and was intended to introduce parol evidence, it would do more mischief, by laying the foundation of a great deal of perjury, than it can possibly do good in any other respect whatsoever (q). Besides, very little inconvenience can arise from my determination to this effect, for the instances of trustees abusing a trust for charity are so frequent, that they are a sufficient warning to reasonable men not to leave their estates under such uncertainty, as to put them absolutely under a person's power, and then trust to his generosity for the disposing of them in charity (r)." Thus, in Lord Hardwicke's view of the subject, a parol trust in mortmain, where the devisee entered into no engagement with the testator, could not be established against the devisee to deprive him of the beneficial interest; and where the devisee did enter into

(p) 3 Atk.141.

(q) Id. 150.

(r) Id. 153.

such an engagement, and the fact was either admitted by the defendant, or established against him by evidence, the trust only was void upon principles of equity, and not the devise of the legal estate by force of the Statute of Mortmain. Lord Northington, on the contrary, thought that secret trusts were within the letter of the Statute of Mortmain; and he therefore decided, that, whether the testator had held communication with the devisee (*s*) or not (*t*), the intention of creating an honorary trust would, if established, avoid the devise of the legal estate itself. "What," he said, "stands in my way? One objection is, that the beneficial devise to the trustees and their heirs by the will is not to be revoked or controlled by the second instrument, it not being executed according to the Statute of Frauds, and therefore it only can be taken as an honorary trust, and as such is not within the Statute of Mortmain. This is as much as to say, that, being a fraud within both acts, it is not within either. And the objection is, that it will be more inconvenient to let in fraud and perjury by opening the Statute of Frauds, than to let in devises to charities by opening the Statute of Mortmain. My opinion is, that the Statute of Mortmain meant to prevent honorary trusts or devises for charities *quâcunque arte vel ingenio*; and the honorary trust infects the will, as much as if it were declared in the most solemn manner (*u*)."
 Sir Thomas Sewell, in the case of *Bishop v. Talbot*, before stated, where the fact of the trust was established on the admission of the devisee, considered the heir as entitled to a resulting trust. His Honor therefore was

(*s*) *Edwards v. Pike*, 1 Ed. 508.

267.

(*u*) *Boson v. Statham*, 1 Ed.

(*t*) *Boson v. Statham*, 1 Ed. 512, 514.

apparently of opinion with Lord Hardwicke, that, in the case of a trust in mortmain not declared according to the Statute of Frauds, the devise of the legal estate was good, as not affected by the Statute of Mortmain, though equity would set it aside on the ground of fraud upon public policy.

In the case of a superstitious use, not void by a statute, but which the Court cannot execute against the policy of the law, the Crown by sign manual will direct the application of it to a legitimate charitable purpose (*x*); and, it was held in *Lady Portington's case*, though Lord Hardwicke has since doubted the doctrine, that, as the King is not bound by the Statute of Frauds, he may establish the fact of a secret superstitious use by parol, even where the testator held no communication with the devisee, and where therefore equity could not relieve upon the ground of fraud (*y*).

(*x*) See *De Costa v. De Pas*, *Attorney-General v. Baxter*, 1 Vern. Amb. 228; *Attorney General v. Moggridge v. Thackwell*, 1 Whorwood, 1 Ves. 536; *Cary v. Ves. jun.* 469.
Abbot, 7 Ves. 490; *Corbyn v. French*, 4 Ves. 433, note (*b*); *At-*

(*y*) See *supra*, p. 29.

CHAPTER V.

IN WHAT WORDS A TRUST MAY BE DECLARED.

A PERSON may declare a trust either directly or indirectly: the former, by creating a trust *eo nomine* in the form and terms of a trust; the latter, without mention of a trust in words, by expressing an intention, which the Court will effectuate by means of a constructive trust (1).

I. Of direct or formal declarations of trust.

To declare a trust formally, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates; an equitable fee may be granted without the word "heirs," and an equitable entail without the words "heirs of the body."

But, though technical terms be not absolutely necessary, yet no rule is better established than that where technical terms are employed, they shall be taken in their legal and technical sense (a).

(a) *Wright v. Pearson*, 1 Ed. *Taylor*, 1 Ed. 367, *per eundem*; 125, *per Lord Henley*; *Austen v. Synge v. Hales*, 2 B. & B. 507,

(1) A constructive trust is properly a trust declared by a party, but indirectly, and therefore construed by the Court. A trust by operation of law is a trust not declared by a party, either directly or indirectly, but arising solely from the effect of a rule of law.

Lord Hardwicke indeed said that, in limitations of a trust either of real or personal estate to be determined in that Court, the construction ought to be the same as in limitations of the legal estate, with this distinction, *unless the intention of the testator or author of the trust plainly appeared to the contrary (b)*.

But this position has since been repeatedly and expressly overruled. "I am of opinion," said Lord Henley, "that a limitation in a trust, perfected and declared by a testator, must have the same construction as the devise of a legal estate executed; and to hold the contrary would make property very precarious and uncertain; the testator would mean one thing in this court, and the direct contrary on the other side of the hall (c)." And on another occasion he observed, "I am very clear that this Court cannot make a different construction in the limitation of a trust, than Courts of law could make on a limitation in a will, for in *both* cases the intention shall take place (d)."

As the rule in *Shelley's case* is not one of construction, that is, of intention, but of law, and was established to remedy certain mischiefs, which, if heirs were allowed to take as purchasers, would be introduced into feudal tenures; it may be thought, that, as trusts are wholly independent of tenure, they ought not to be affected by the operation of the rule; and the cases of *Withers v.*

per Lord Manners; *Jervoise v.* 655.
Duke of Northumberland, 1 J. & W. 571, *per* Lord Eldon; *Lord* 125.
Glenorchy v. Bosville, Cas. t. Talb. (d) *Austen v. Taylor*, 1 Ed. 367; and see *Philips v. Brydges*, 3 Ves. jun. 125; *Jervoise v. Duke of Northumberland*, 1 J. & W. 571.
 19, *per* Lord Talbot; *Bale v. Coleman*, 8 Vin. 268, *per* Lord Harcourt.
 (b) *Garth v. Baldwin*, 2 Ves. 571.

Allgood (e), and *Bagshaw v. Spencer* (f), seem to lend some countenance to the doctrine.

In *Withers v. Allgood* a person had conveyed freeholds and leaseholds to trustees, to hold such as were freehold to the use of the trustees and their heirs, and the leaseholds to the trustees, their executors, and administrators, in trust to apply the rents to H. W. for life, and afterward to the heirs of her body, and of J. M. and their heirs; and Lord Talbot held, that the heirs of H. W. took as *purchasers*, they being joined with the heirs of others who could only take in that capacity. His Lordship observed, that the rule of law was not so strict as to control the intent where it was plain.

In *Bagshaw v. Spencer* the trust was for A. during his life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A., with remainders over; and Lord Hardwicke decreed the heirs to take as purchasers, though, unquestionably, in the case of a legal estate, the rule in *Shelley's case* must have prevailed. But his Lordship did not thus decide upon the ground, that, as the rule originated in tenure, it was inapplicable to trusts; but, holding the rule to be in all cases one of construction, he thought the words might in a trust be more largely and liberally interpreted. "It is said," he observed, "that the law will not suffer its rules to be contradicted, but will supersede the intent, and reduce the gift to its own operation, such as it will allow. I admit the general principle, but it is misapplied here.

(e) Cited in *Bagshaw v. Spencer*, 1 Ves. 150; 1 Coll. Jur. 403. (f) 1 Ves. 142; 1 Coll. Jur. 378.

The law will not suffer a perpetuity, or the freehold to be in abeyance, &c., because it would change the law, and, by acts of private persons, vary the rules of property. *That* arises from want of power in the testator; but in the present case there is no want of power, there being no doubt but the testator might devise for life with contingent remainders. The only objection is, that he has used improper words, which the law will not allow to have that effect (*g*)."

But whatever respect may be due to these decisions, they cannot prevail against the weight of modern authority. To omit the case of *Garth v. Baldwin* (*h*), in which Lord Hardwicke himself appears to have felt a doubt upon his own previous opinion, in *Wright v. Pearson* (*i*) before Lord Northington, where an estate was limited to A. for life, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of A. lawfully to be begotten, and their heirs, provided that in case A. should die without having any issue male of his body living at his death, then, subject to certain annuities, remainder over, Lord Northington, though the case was the exact counterpart of *Bagshaw v. Spencer*, determined that heirs of the body must be taken as words of limitation. But it is observable, that Lord Northington also did not advert to the question, whether the rule in *Shelley's case*, as founded on tenure, was or not applicable to trusts, which were wholly independent of tenure; but, assuming the rule to be in all cases one of construction, that is, to be governed by the intent (*k*), he thought himself bound, in respect of a

(*g*) 1 Ves. 146.

(*h*) 2 Ves. 646.

(*i*) 1 Ed. 119.

(*k*) *Wright v. Pearson*, 1 Ed.
128; and see *Austen v. Taylor*,
1 Ed. 367.

trust, to abide by the precedents determined upon legal estates (l).

The authority of *Wright v. Pearson* has since been approved by Lord Thurlow, in the case of *Jones v. Morgan* (m). The limitations of the trust were to A. for life without impeachment of waste, remainder to the heirs male of the body of A. lawfully begotten, severally, respectively, and in remainder one after the other, as they and every of them should be in seniority of age and priority of birth, with remainders over; and Lord Thurlow expressed his opinion (the decision was partly on this, and partly on another ground,) that the rule in *Shelley's case* must prevail in equity as at law, notwithstanding the clear intention to the contrary. Perhaps, therefore, we may conclude at the present day, that, although the rule may not be equally applicable to trusts, the Court has determined it shall be equally applied.

We have said, that, if technical words be employed, they must be taken in their legal and technical sense; but a distinction must be drawn between trusts executed, and trusts that are only executory: for to trusts executed the position is strictly applicable, but in the case of trusts that are executory it must be received with considerable allowance.

A trust *executed* is where the limitations of the equitable interest are complete and final; in the trust *executory*, the limitations of the equitable interest are not intended to be complete and final, but merely to serve as minutes or instructions for perfecting the settlement at some future period.

The distinction we are considering was very early

(l) *Wright v. Pearson*, 1 Ed. 125. (m) 1 B. C. C. 206.

established, and was recognised successively by Lord Cowper (n), Lord King (o), Lord Talbot (p), and by no one more frequently than by Lord Hardwicke himself (q); yet in *Bagshaw v. Spencer* (r) Lord Hardwicke almost denied that any such distinction existed. "As to the difference," he said, "between trusts executed and trusts executory, no one is more unwilling than I am *quieta movere*; but this distinction never has been established by any direct resolution, though said *arguendo*, and was it to be examined to the bottom, it might sound strange how it should be established. *All* trusts in notion of law are executory (s), and to be carried into execution here by *subpœna*. The first essential part of a trust is, that the trustee is to convey the estate some time or other, whether the testator has directed it or not, which every testator is presumed to know; therefore a doubt may be reasonably made how there can be a difference, whether the testator has directed a conveyance or not."

In a subsequent case (t) his Lordship felt himself called upon to offer some explanation. "He did not mean," he said, "in *Bagshaw v. Spencer*, that no weight

(n) *Bale v. Coleman*, 8 Vin. 267; *Earl of Stamford v. Sir John Hobart*, 3 B. P. C. 33.

(o) *Papillon v. Voice*, 2 P. W. 471.

(p) *Lord Glenorchy v. Bosville*, Cas. t. Talb. 3.

(q) *Gower v. Grosvenor*, Barnard. 62; *Roberts v. Dixwell*, 1 Atk. 607; *Baskerville v. Baskerville*, 2 Atk. 279; *Marryat v. Townly*, 1 Ves. 102; *Read v. Snell*, 2 Atk. 648; *Woodhouse v.*

Hoskins, 3 Atk. 24.

(r) 1 Ves. 152; and see *Hopkins v. Hopkins*, 1 Atk. 594.

(s) See Lord Eldon's observations, *Jervoise v. Duke of Northumberland*, 1 J. & W. 570; and Lord Henley's, *Austen v. Taylor*, 1 Ed. 366.

(t) *Exel v. Wallace*, 2 Ves. 323. And Lord Henley once said, he believed Lord Hardwicke had at last renounced his opinion, *Barnard v. Proby*, 2 Cox, 8.

was to be laid on the distinction, but that, if it had come recently before him, he should then have thought there was little weight in it, although he should have had that deference for his predecessors, as not to lay it out of the case, not intending to say that all which his predecessors did was wrong founded, which he desired might be remembered."

But whatever doubts may formerly have existed upon the subject, they have long since been dispelled by the authority of succeeding judges.

"The words *executory trust*," said Lord Northington, "seem to me to have no fixed signification. Lord King describes an *executory trust* to be, where the party must come to this Court to have the benefit of the will. But that is the case of every trust; and I am very clear, that this Court cannot make a different construction on the limitation of a trust, than courts of law would make on a limitation in a will, for in both cases the intention shall take place. The true criterion is this: wherever the assistance of this Court is necessary to complete a limitation, in that case, the limitation in the will not being complete, that is sufficient evidence of the testator's intention that the Court should model the limitations. But where the trusts and limitations are already expressly declared, the Court has no authority to interfere, and make them different from what they would be at law (u)." And Lord Eldon observed, "Where there is an *executory trust*, that is, where the testator has directed something to be done, and has not himself completed the devise, the Court has been in the habit of looking to see what was his intention; and if what he has

(u) *Austen v. Taylor*, 1 Ed. *Lennard*, 1 Ed. 95; *Wright v.* 366, 368: and see *Stanley v. Pearson*, 1 Ed. 125.

done amounts to an imperfection with respect to the execution of that intention, the Court inquires what it is itself to do, and it will mould what remains to be done, so as to carry that intention into execution: I repeat, where there is a trust *executory*; because one is a good deal confused by the inaccuracy of the expressions 'trust *executory*,' and 'trust *executed*.' The latter, no doubt, in one sense of the word is a trust *executory*, that is, if A. B. is a trustee for C. D., or for C. D. and others, that in this sense is *executory*, that C. D., or C. D. and the other persons, may call upon A. B. to make a conveyance, and execute the trust. But these are cases where the testator has clearly decided what the trust is to be; and, as equity follows the law, where the testator has left nothing to be done, but has himself expressed it, there the effect must be the same, whether the estate is equitable or legal (x)."

We proceed to the inquiry to what extent in *executory* trusts a latitude of construction is admissible; and, to draw the line correctly, we must again distinguish between *executory* trusts as in marriage articles, where the Court has a clue to the intention from the very nature of the contract, and *executory* trusts as in wills, where the Court knows nothing of the object in view, *a priori*, but in collecting the intention must be guided solely by the language of the instrument.

This distinction was at first but very imperfectly understood. Because *executory* trusts under wills admitted a degree of latitude, it was held by some, they were to be treated precisely on the same footing as *executory* trusts in marriage articles; while, because they did not

(x) *Servoise v. Duke of Northumberland*, 1 J. & W. 570.

admit an equal latitude of construction, it was held by others they were not to be distinguished from trusts executed.

Thus in *Bale v. Coleman* (*y*), where the executory trust arising under a will was for A. during life with a power of leasing, and after his decease to the heirs male of his body, Lord Cowper decreed a strict settlement to be made; for, in the case of a will or articles, he said, where the thing was to be executed, the intent of the party should be pursued (*z*). But Lord Harcourt, on the rehearing, overruled his predecessor's decision, and directed A. to be made tenant in tail under the settlement; for all wills, he said, ought to be construed according to the true intent of the testator, so as such intent was consistent with the rules of law; that the same words in a will, which at law would create a legal entail, ought to be construed in that Court, when they fell under a trust, and were to be carried into further execution, so as to create an equitable entail (*a*).

And Lord Eldon once said, "There is no difference in the execution of an executory trust created by a will, and of a covenant in marriage articles; such a distinction would shake to their foundation the rules of equity (*b*).” But Lord Manners said he could not assent to this doctrine (*c*), and Lord Eldon some time after took an opportunity of correcting himself (*d*).

The distinction we are considering has been put in a

(*y*) At the present day this would be considered a case of trust executed.

(*z*) 8 Vin. 267.

(*a*) See *Papillon v. Voice*, 2 Cox's P. W. 474, note 1; and see 8 Vin. 268.

(*b*) *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 227, 230.

(*c*) *Strafford v. Powell*, 1 B. & B. 25; *Synge v. Hales*, 2 B. & B. 508.

(*d*) *Jervoise v. Duke of Northumberland*, 1 J. & W. 574.

very clear light by Sir John Leach. "I know of no difference," he said, "between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. Where the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement be to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention. But if a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit; the subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given. But if it is clearly to be ascertained from any thing in the will, that the testator did not mean to use the expressions, which he has employed, in their strict proper and technical sense, the Court, in decreeing such settlement as he has directed, will depart from his words in order to execute his intention (e).

To apply the foregoing distinction to the cases that have occurred; if in *articles* the property of the husband or wife be so limited to the heirs of the body, or the issue (f), of the contracting parties, or either of them, that heirs of the body, or issue, if taken in their ordinary legal sense, would enable one or other of the parents to

(e) *Lord Deerhurst v. Duke of Maguire v. Scully*, 2 Hog. 113.
St. Albans, 5 Mad. 260; and see (f) *Dod v. Dod*, Amb. 274.

defeat the provision intended for the children, these words will then be construed in equity to mean first and other sons; and the settlement will be made upon them successively in tail, as purchasers (*g*).

If the settlement has been already made, then, provided the execution of it was after the marriage, it will be rectified by the articles (*h*); but if the execution of it was prior to the marriage, the Court will presume the parties to have entered into a different agreement (*i*), unless the settlement expressly state itself to be made in pursuance of the articles, when that presumption will be rebutted and the settlement will be rectified (*k*).

But a strict settlement will not be decreed, where the property of the husband is limited to the heirs of the body of the wife; for this creates an entail which neither husband nor wife can bar without the concurrence of the other (*l*), and the intent may have been, that the husband and the wife jointly should have the power of destroying the entail (*m*). And the law will be the same, wherever the limitations are so managed, that the consent

(*g*) *Handick v. Wilkes*, 1 Eq. Ca. Ab. 393; *Trevor v. Trevor*, 1 P. W. 622; *Jones v. Langton*, 1 Eq. Ca. Ab. 392; *Cusack v. Cusack*, 5 B. P. C. 116; *Griffith v. Buckle*, 2 Vern. 13; *Stonor v. Curwen*, 5 Sim. 269, per Sir L. Shadwell.

Talbot, 20; and see *Warrick v. Warrick*, 3 Atk. 291.

(*h*) *Streatfield v. Streatfield*, Cas. t. Talb. 176; *Warrick v. Warrick*, 3 Atk. 293, per Lord Hardwicke; *Legg v. Goldwire*, Cas. t. Talb. 20, per Lord Talbot; *Burton v. Hastings*, Gilb. Eq. Rep. 113; *S. C.* 1 Eq. Ca. Ab. 393, overruled.

(*k*) *Honor v. Honor*, 1 P. W. 123; *Roberts v. Kingsley*, 1 Ves. 238; *West v. Errissey*, 2 P. W. 349; but not it seems against a purchaser, *Warrick v. Warrick*, 2 Atk. 291.

(*l*) See 3 & 4 W. 4, c. 74, sec. 16.

(*m*) *Howel v. Howel*, 2 Ves. 358; *Whately v. Kemp*, cited Ib.; *Honor v. Honor*, 1 P. W. 123; *Green v. Ekins*, 2 Atk. 477, per Lord Hardwicke; *Highway v. Banner*, 1 B. C. C. 587, per Sir L. Kenyon.

of both parents must be had for defeating the claims of the issue (n).

Nor will the Court read heirs of the body as first and other sons, where such a construction is negatived by any thing in the articles themselves: as if one part of an estate be limited to the husband for life, remainder to the wife for life, remainder to the first and other sons in tail, and another part be given to the husband for life, remainder to the heirs male of his body; for, as it appears the parties knew how a strict settlement should be framed, the limitation of part of the estate in a different mode could only have proceeded from a different intention (o).

It was formerly argued, that daughters in marriage articles were not entitled to the same consideration as sons, on the ground that they do not, like sons, continue the name of the family, and are generally provided for, not by the estate itself, but by portions out of the estate; but it is now clearly settled, that, as they are purchasers under the marriage, and are entitled to some provision, the Court will in their favour construe heirs female to mean daughters (p); and, except the articles themselves make an express provision for them by way of portion, &c. (q), will hold daughters, as well as sons, to be included under the general term of heirs of the body (r), or issue (s). And the settlement will be executed on the daughters, in default of sons, as tenants in common in tail general, with cross remainders between them.

(n) *Highway v. Banner*, 1 B. C. C. 584.

(o) *Howel v. Howel*, 2 Ves. 359; and see *Powell v. Price*, 2 P. W. 535; *Chambers v. Chambers*, Fitzgib. Rep. 127; S. C. 2 Eq. Ca. Ab. 35.

(p) *West v. Errissey*, 2 P. W. 349.

(q) *Powel v. Price*, 2 P. W. 535; and see Mr. Fearn's observations, *Conting. Rem.* 103.

(r) *Burton v. Hastings*, Gilb. Eq. Rep. 113; S. C. 1 Eq. Ca. Ab. 393, per Lord Cowper.

(s) *Hart v. Middlehurst*, 3 Ask. 371; and see *Maguire v. Scully*, 2 Hag. 113; S. C. 1 Beat. 370.

Again, if in *articles* a party covenant to settle goods and chattels upon the same trusts, and for the same intents and purposes, as the freeholds were before settled, the Court will not apply the limitations to the personal estate literally, the effect of which would be to vest the absolute interest in remainder in the first son on his birth, but will insert a proviso that will have the effect, at least to a certain extent, of making the personal estate follow the course of the real.

Sir Joseph Jekyll said, the practice of conveyancers was to insert a limitation over on "dying under 21 (*t*);" but Lord Hardwicke conceived the common limitation over to be on "dying under 21 without issue (*u*)."
In *The Duke of Newcastle v. The Countess of Lincoln* (*x*) the chattels were articted to be settled to the same uses as the realty, viz. to A. for life, remainder to the first and other sons in tail male, remainder to B. for life, remainder to B.'s first and other sons in tail male, remainders over. A. died, having had a son, who lived only nine months. Lord Loughborough said, "I perfectly agree that in wills you are not to do for the testator all that can be done by law; you are to do for the testator no more than what he has intended to be done, and according to the common acceptation of the words. But I put it to you whether in the nature of things there is not a radical and essential difference between marriage settlements and wills. The parties contract upon a settlement for all the remainders; they are not voluntary, but within the consideration; the issue are all purchasers. Suppose then a settlement to be made of freehold estate, and as to the leasehold estate there is only this article, that the settlement shall be analogous to that of the

(*t*) *Stanley v. Leigh*, 2 P. W. 63; S. C. 5 Mad. 348.
690.

(*x*) 3 Ves. 387.

(*u*) *Gower v. Grosvenor*, Barn.

freehold: do I execute it, and make a like settlement, by giving an interest which cuts off all the issue? Suppose a bill was brought to carry the settlement into effect after a child had lived a single day; should I permit the father to say it was his property? It is utterly impossible to make the identical settlement of the leasehold estate as of the freehold; but if I am to make it in analogy to the settlement of the freehold, shall I not carry it on to all the near events, or shall they fail because I cannot embrace all the remote events (*y*)? My opinion decidedly is, that, in the case of marriage articles, the settlement should be such that no child born and not attaining twenty-one should, by his birth, attain a vested interest to transmit to his representatives, and thereby defeat the ulterior objects of the articles, which are not decidedly in favour of one son, but equally extended to every son; and that I take to be the settled rule and established practice (*z*).” His Lordship therefore held that the leaseholds had not vested absolutely in the deceased son of A., and ordered a proviso to be inserted in the settlement, that they should not vest absolutely in any son of B. who should not attain twenty-one or die under that age leaving issue male. From this decision an appeal was carried to the House of Lords (*a*), but, before the cause could be heard, a son of B. having attained twenty-one, the decree was, that the son of B. had become absolutely entitled. Thus the House of Lords decided that the absolute interest had not vested in the first tenant in tail on his birth; but what proviso ought to have been inserted, whether a limitation over “on dying under twenty-one,” or “on dying under twenty-one without issue male,” the House in event was

(*y*) *Ib.* 394.(*z*) *Ib.* 397.(*a*) 12 Ves. 218.

not called upon to determine. The order of the House of Lords in this case was made with the full approbation of Lord Ellenborough and Lord Erskine, who took part in the debate; and Lord Thurlow, it seems, entertained a similar opinion (*b*). But Lord Eldon denied there was any distinction between articles and wills, and therefore, relying upon *Foley v. Burnell*, and *Vaughan v. Burslem*, two cases upon wills decided by Lord Thurlow, he said, had the cause come originally before him, he should have decreed the absolute interest to have vested in the eldest child upon birth; that, notwithstanding several *dicta* in favour of a limitation over, no case could be found in which articles had been actually so executed; that assignments had been made of leasehold property under the notion that a son when born would take an absolute interest, and, were the House to sanction the decree of Lord Loughborough, it would shake a very large property (*c*). However, his Lordship conceived that Lord Hardwicke's doctrine was originally the best, and therefore, recollecting the opinion of that great Judge, the opinion of Sir Joseph Jekyll, and the decision of the Court below, and knowing the concurrent opinions of Lord Ellenborough and Lord Erskine, and also the opinion of Lord Thurlow, (whose present sentiments, however, he could not reconcile with the cases of *Foley v. Burnell* and *Vaughan v. Burslem*, formerly decided by his Lordship (*d*),) he bowed to all these authorities, and, though he was in some degree dissatisfied with the determination, he nevertheless would not move an amendment (*e*).

(*b*) 12 Ves. 237.

(*c*) *Ib.* 236, 237.

(*d*) Lord Eldon could not reconcile Lord Thurlow's opinion with these cases, because his Lordship

refused to admit the distinction between articles and wills.

(*e*) *The Countess of Lincoln v. The Duke of Newcastle*, 12 Ves. 237.

It must be observed, that a settlement of the personalty cannot be made exactly analogous to a settlement of the realty, whether the limitation adopted be "on dying under twenty-one," or "on dying under twenty-one without issue." For if the former be supposed, then, the object of the articles being to knit the leasehold estate to the freehold, if the son die under age leaving issue who will succeed to the freehold, the two estates will go in different directions (*f*). But, if the limitation be on "dying under twenty-one without issue," then, if the son die leaving issue, the grandchild may die under age and unmarried, when the leaseholds will go to his personal representative, while the freeholds will devolve on the second son; not to mention that the son may at fourteen make a will of the leaseholds subject to the contingency of his dying without issue (*g*), so that, if the grandchild live, he will take the leaseholds at the mercy of the parent; and, even if the son make no will, the grandchild will not be entitled to the whole of the chattels, the widow of the intestate laying claim to her thirds. The case of *The Countess of Lincoln v. The Duke of Newcastle* appears to be the only one upon the subject, and that has sanctioned the insertion of the proviso, "on dying under twenty-one without issue."

Again, in *articles*, as jointenancy is an inconvenient mode of settlement on the children of the marriage, (for, during their minorities no use can be made of their portions, as the jointenancy cannot be severed (*h*),) the Court will rectify the articles by the presumed intent of the contract, and will permit words, that would be construed

(*f*) *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 228. & Lef. 88, per Lord Redesdale; and see *Rigden v. Villier*, 3 Atk.

(*g*) *Ib.* 229. 734, and *Marryat v. Townley*, 1

(*h*) *Taggart v. Taggart*, 1 Sch. Ves. 103.

a jointenancy at law, to create in equity a tenancy in common (*i*).

In other cases the Court has varied the literal construction by supplying words, as, where the agreement was to lay out £200 in the purchase of £30 a year to be settled on the husband and wife for their lives, remainder to the heirs of their bodies, remainder to the husband in fee, and, until the settlement should be made, the £200 was to be applied to the separate use of the wife, and, if no settlement were executed during their joint lives, the £200 was to go to the wife if living, but, if she died before her husband, then to her brother and sister, and the wife died before her husband, but left issue, it was held the brother and sister had no claim to the fund, the words "if she died before her husband" intending plainly if she so died "without leaving issue (*k*)."

Next as to *wills*; and here, as no presumption arises *a priori*, that "heirs of the body" were intended as words of purchase, if the executory trust be to "A. and the heirs of his body (*l*)," or to "A. and the heirs of his body and their heirs (*m*)," or to "A. for life and after his decease to the heirs of his body (*n*)," (but *quære* if to "A. for life and after his decease to the heirs of his body and their heirs (*o*)") the legal and ordinary construction will be adopted, and A. be made tenant in tail. So, where the

(*i*) *Taggart v. Taggart*, 1 Sch. & Lef. 84.

(*k*) *Kentish v. Newman*, 1 P.W. 234; and see *Targus v. Puget*, 2 Ves. 194.

(*l*) *Harrison v. Naylor*, 2 Cox, 247; *Bagshaw v. Spencer*, 1 Ves. 151, *per* Lord Hardwicke; *Marshall v. Bousfield*, 2 Mad. 166.

(*m*) *Marryat v. Townley*, 1 Ves. 104, *per* Lord Hardwicke.

(*n*) *Blackburn v. Stables*, 2 V. & B. 370, *per* Sir W. Grant; *Seale v. Seale*, 1 P. W. 290; *Meure v. Meure*, 2 Atk. 266, *per* Sir J. Jekyll.

(*o*) See *Marryat v. Townly*, 1 Ves. 104.

estate was directed to be settled on the testator's "daughter and her children, and, if she died without issue," the remainder over, the Court said, that, by an immediate devise of the land in the words of the will, the daughter would have been tenant in tail, and in the case of a voluntary devise the Court must take it as they found it, though upon the like words in marriage articles it might have been otherwise (*p*).

And where a testator directed lands to be settled on his "nephew for life, remainder to the heirs male of his body, and the heirs male of the body of every such heir male, severally and successively one after another as they should be in seniority of age and priority of birth, every elder and the heirs male of his body to be preferred before every younger," Lord Cowper said, the nephew took by a voluntary devise, and, although executory, it was to be taken in the very words of the will as a devise, and was not to be supported or carried further in a Court of Equity, than the same words would operate at law in a voluntary conveyance (*q*). The decision apparently went upon the ground, that the words "and the heirs male of the body of every such heir male, severally and successively, &c." were all included in the notion of an entail, and *expressio eorum, quæ tacite insunt, nihil operatur*. Had the limitation been to "the heirs male and their heirs" the construction might have been different.

And in a more recent case, where the executory trust was for A. generally, with a direction, that the trustees should not give up their trust till "a proper entail was made to the heir male by him," it was determined that A.

(*p*) *Sweetapple v. Bindon*, 2 Vern. 536. (*q*) *Legatt v. Sewell*, 2 Vern. 551.

took an estate tail (*r*). But, in another case, where the devise was extremely similar, viz. to A. with a direction that the estate "should be entailed on his heir male," Lord Eldon, on the assumption that it was an executory trust and not a legal devise, considered the entail so doubtful that he would not compel a purchaser to accept a title under it (*s*).

But "heirs of the body" will be read first and other sons in wills, as well as in articles, provided the testator expressly manifest such an intention, as if he direct a settlement on A. for life "without impeachment of waste (*t*)," or with a limitation to preserve contingent remainders (*u*), or if he desire that "care be taken in the settlement, that the tenant for life shall not bar the entail (*x*);" and in one case "heirs of the body" was so construed, where a testator had devised to the separate use of a *feme covert* for life, so as she alone should receive the rents, and the husband should not intermeddle therewith, and after her decease in trust for the heirs of her body; for, from the limitation to the heirs immediately after the wife's decease, coupled with the direction that the husband should not intermeddle with the estate, the Court collected the intention of excluding the husband's curtesy, an object which could only be accomplished by giving to "heirs of the body" the construction of words of purchase (*y*).

And a direction to settle on A. and the heirs of his

(*r*) *Blackburn v. Stables*, 2 V. & B. 367; recognised in *Marshall v. Bougfield*, 2 Mad. 166.

(*s*) *Jervoise v. Duke of Northumberland*, 1 J. & W. 559.

(*t*) *Glenorchy v. Bosville*, Cas. t. Talbot, 3.

(*u*) *Papillon v. Voice*, 2 P. W. 471.

(*x*) *Leonard v. Lord Sussex*, 2 Vern. 526.

(*y*) *Roberts v. Dixwell*, 1 Atk. 607; *S. C.* West's Rep. t. Lord Hardwicke, 536.

body "as counsel shall advise (z)," or "as the executors shall think fit (a)," is strong collateral evidence, that something more was intended than a simple estate tail.

We may here remark that "heirs of the body" and "issue" are far from being synonymous expressions. The former are properly words of limitation, whereas the latter term is in its primary sense a word of purchase. In several cases the Court appears to have ordered a strict settlement from the use of the term "issue," where, had the expression been "heirs of the body," the estate would probably have been construed an entail (b).

Of course daughters as well as sons will be included under "heirs of the body" (c), or "issue" (d); for, they equally answer the description, and are equally objects of bounty; and the settlement will be made upon them, in default of sons, as tenants in common in tail general, with cross remainders between them (e).

In the foregoing cases the Court has rectified the will on the ground of the limitations having been imperfectly declared, but if a testator direct a settlement, and declare the limitations himself, intending them to be final, the hands of the Court are bound, and the words must be taken in their natural sense. Thus a testator devised to A. for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A., remainder over, and then

(z) *White v. Carter*, 2 Ed. 366; reheard, Amb. 670.

(a) *Read v. Snell*, 2 Atk. 642.

(b) *Ashton v. Ashton*, cited in *Bagshaw v. Spencer*, 1 Coll. Jur. 402; *Meure v. Meure*, 2 Atk. 265; and see *Horne v. Barton*, Coop. 25.

(c) *Bastard v. Proby*, 2 Cox, 6.

(d) *Meure v. Meure*, 2 Atk. 265; *Ashton v. Ashton*, cited in *Bagshaw v. Spencer*, 1 Coll. Jur. 402.

(e) *Meure v. Meure*, *Ashton v. Ashton*, and *Bastard v. Proby*, *ubi supra*.

directed the residue of his personal estate to be laid out in a purchase of lands, and declared that the lands when purchased "should remain and continue to for and upon such and the like estate or estates, uses, trusts, intents, and purposes, and under and subject to the like charges, restrictions, and limitations, as were by him before limited, and declared of and concerning his lands and premises thereinbefore devised, or as near thereto as might be, and the deaths of parties would admit." Lord Northington observed, "It is said, that, if the limitations had been repeated, it would have been the same with *Papillon v. Voice*; but I think not; because the testator refers no settlement to his trustees to complete, but declares his own uses and trusts, which being declared, I know no instance, where the Court has proceeded so far as to alter or change them (*f*)." However, the decision to which his Lordship came seems not to have met with the entire approbation of Lord Eldon (*g*).

With respect to executory trusts of *chattels* in wills we have to consider two questions: first, what will be construed an executory trust, and, secondly, how an executory trust, when determined to be such, will be carried into execution.

In all the cases that have occurred upon this subject the bequest, instead of being direct, has been by way of reference to a previous strict settlement of realty.

In *Gower v. Grosvenor* (*h*) the testator expressed himself as follows: "My will and mind is, that my library, &c., should go as heir-looms, so far as they can by law, to the heir male of my family, as my real estate is hereby settled;" and Lord Hardwicke said, "This is to be taken as a directory clause to the executors. I am

(*f*) *Austen v. Taylor*, 1 Ed. 361. *Northumberland*, 1 J. & W. 572.

(*g*) See *Green v. Stephens*, 17 Ves. 76; *Jervoise v. Duke of* 337.
(*h*) Barn. 54, S. C. 5 Mad.

inclined to consider all clauses of this kind in any ways referring to the rules of law in this manner. There are no express words of devise, but it is only said 'my will and mind is, &c.', and where it is afterwards said 'as far as by law they can,' it would be a very hard construction to call this an express gift or legacy to the party on purpose to defeat the intention of the testator. Indeed all personal things first vest in the executors, and I think here is nothing done, which is to be considered a general assent in the executors to defeat or divest the property out of themselves; but I rather think the property may still be considered as remaining in the executors (i);" and, taking it as an executory trust, his Lordship expressed his opinion, (for the case did not call for a decision,) that from the words "as far as by law they can" the court would model the limitation to the utmost legal extent, by settling the property to the first and other sons, with a limitation over on dying under twenty-one without issue (k).

In *Trafford v. Trafford* (l), which was also before Lord Hardwicke, the testator had devised his lands to the use of T. W. in fee in trust for Sigismund Boehm for life, remainder to the first and other sons in tail male, remainder to Clement Boehm for life, remainder to the first and other sons in tail male, with remainders over, and then bequeathed certain chattels in the following terms: "I devise all my plate, &c. to such male person (when he shall attain the age of twenty-one) who shall then be entitled to the trust in possession of the real estates hereinbefore devised, and I direct that, till such male person shall attain twenty-one, the said plate, &c.

(i) 5 Mad. 348.

(k) Barn. 62; 5 Mad. 347.

(l) 3 Atk. 347.

shall be kept on D., and be used by such male person residing there;" and the testator "*declared it to be his express will and desire*, that the said plate, &c. might in the nature of heir-looms go with his said estate, and be used therewith, *as long as the laws of the realm would permit.*" It appears from the Registrar's Book, that Sigismund Boehm, who took the name of Trafford, enjoyed the use of the heir-looms during his life, and died without having had issue, leaving Elizabeth his wife executrix.

Clement Trafford was abroad at the time of his brother's death, and died on his passage home. The bill was filed by the eldest son of Clement to have the benefit of the heir-looms, which was resisted by the defendant Elizabeth Boehm, on the ground that the bequest to "such male person, when twenty-one," had vested the absolute property in Sigismund, who, it appears, was under twenty-one at the date of the will, but had afterwards attained that age. Lord Hardwicke said, "The construction the plaintiff's counsel put upon it is, that by the penning of this clause, and particularly by the operation of the latter words, these things are to go as heir-looms as far as by law they may. The construction of the defendant's counsel is, that it ought not to have this large construction of going in succession as heir-looms from person to person, but should vest in the first taker, whether tenant for life or tenant in tail, and he should have the absolute property at twenty-one. But *I am of opinion, that it should go in such kind of succession as I directed in the case of Leveson v. Grosvenor.* The first part of the clause, I allow, would give the absolute property (*m*), if it stopped there; but I am

(*m*) The bequest was like a legacy to A. when 21, with the intermediate interest, which is construed a vested legacy.

not warranted to rest there ; for the whole clause must be taken together, so as that it may be entirely consistent. As to the latter part of the clause, *supposing that had been the single one, it would have been sufficient to make all these go as heir-looms, and to wait the contingency ;* and of that opinion I was in *Leveson v. Grosvenor*, for the words there were extremely like them, though not exactly the same. The first words therefore must be construed as a disposition only of the use, until some person entitled to the inheritance shall come into possession by attaining twenty-one. It has been objected, that the testator has distinguished between the *property* and the *use*, for there is a mesne disposition ; and if there had been no more than the gift and their remaining at D., it would have been a right construction ; but then he says ‘ to go in succession as far as the law will permit.’ There is a direction to executors, whom by virtue of this last clause he has made trustees for the purpose, what should be done in the mean time, and not to hinder them of the use before they come of age. To say they should only go as heir-looms, till a *tenant for life* attain twenty-one, is a forced construction ; for what is there then of the nature of inheritance in these heir-looms, if they should stop there. I am of opinion they should go as heir-looms, in as full manner as the law will allow.” And his Lordship decreed, that the chattels should go as heir-looms as far as by the rules of law and equity they might, and that the plaintiff would be entitled to the *property* thereof, *in case he attained twenty-one*, and in the mean time was entitled to the *use* thereof.

The latter part of the clause therefore was clearly considered by Lord Hardwicke to be directory, and to

be sufficient to make the chattels go as heir-looms and to wait the contingency.

In the case of *Foley v. Burnell* (n) the testator bequeathed all the standards, fixtures, &c. "to be held and enjoyed by the several persons, who from time to time should respectively and successively be entitled to the use and possession of the houses before devised by him in strict settlement, as and in the nature of heir-looms, to be annexed to and go along with such houses respectively;" and then added, "It is my will and intention, that one of the services of plate should go to and be enjoyed by the possessor of W., and the other by the possessor of S. for the time being." Edward Foley was first tenant for life of the real estate; and Lord Thurlow, in the course of his argument, observed, "This must be interpreted a devise of personalty to A. for life, remainder over to persons who have a springing use. The legal interest vests in Edward Foley, and the subsequent interests are legal interests to be carried into execution when they arise." This therefore in his Lordship's opinion was the case of a trust executed. It was afterwards discovered that a son had been born to Edward, and Lord Thurlow decided that the heir-looms had become absolutely vested in that son. The cause was reheard upon this point before Lord Loughborough, Mr. Justice Ashurst, and Baron Hotham, and the decision was affirmed.

Lord Eldon has remarked that Lord Loughborough in his argument reasoned upon this case as that of a will directing an executory trust (o). The following must have been the passage to which Lord Eldon alluded. "It is argued," said Lord Loughborough, "that, from the

(n) 1 B. C. C. 274.

of *Newcastle*, 12 Ves. 234.

(o) *Countess of Lincoln v. Duke*

testator's anxiety to protect the property, he has given a sufficient hint to the Court to carry on the limitations. Will not any hint which shall go to one case go to another?" And then pointing out the difficulties the Court would have to encounter, were it called upon to give directions, he concluded, that the Court could go no farther than the clear devise. Now these observations were apparently addressed to a direct bequest, and were meant to convey nothing more, than that the intention of a testator was not to be made matter of conjecture; at all events his Lordship was not delivering his own opinion, but was showing the fallacy of the plaintiff's argument by adverting to the mischievous consequences to which it would lead. Mr. Justice Ashurst assumed without remark that the bequest was direct. "Where," he said, "the testator leaves it to the Court to make the conveyance, the Court will protect the property as far as may be; but here he has taken upon him to be his own conveyancer." Baron Hotham did not allude to the point. In this case, therefore, it was clearly held by Lord Thurlow and Mr. Justice Ashurst, that the clause was not of a directory character, and how the Court would have treated an executory trust was consequently not determined.

In *Vaughan v. Burslem* (p) the testator said, "I direct that all my plate, &c. shall go as heir-looms with my real estate, and be held and enjoyed by the person or persons that shall for the time being by virtue of my will be entitled to my real estate, *as far as the rules of law and equity will permit.*" Thus the direction in this case was precisely the same as in *Leveson v. Grosvenor*, and *Trafford v. Trafford*. Lord Thurlow's decision was that the heir-looms had vested absolutely in the first

tenant in tail. His Lordship said, "I am called upon to say that the effect of the will is to prevent the use from springing (viz. to the first tenant in tail), where, if it sprang, it would give the absolute interest. To do this, I must determine that the use shall not spring or vest till twenty-two years after the death of the first taker for life. How am I to gather this? from the words 'as far as the rules of law and equity will permit?' This cannot be; the uses could not go farther than the law will permit. But these words *have their sense; for, the testator seems to have known that the personal property could not go so far as the real.* The property cannot be rendered inalienable, but by preventing the use from springing, which cannot be when a person is born who would take absolutely. It would be *a direction to keep it inalienable as long as can possibly be. I am of opinion that the words are not sufficient to give such a construction.*" Thus, Lord Thurlow overruled the authority of Lord Hardwicke as to the interpretation of the words "as far as the rules of law and equity will permit," for Lord Hardwicke had construed them as a direction to the Court to make the property inalienable as long as the law would allow; whereas Lord Thurlow conceived them to mean nothing more, than that the limitations of the realty should apply to the personalty according to the different nature of the two estates. From the concluding words of his Lordship's argument we may reasonably infer, that, had the testator given the proper directions, the Court would have had no alternative but to tie up the property.

. In *Carr v. Erroll* (q) the bequest was to trustees

(q) 14 Ves. 478.

upon trust to permit the heir-looms to go together with the mansion-house, &c., "for so long a time as the rules of law and equity would permit;" and Sir W. Grant held it a trust executed, and the property to have vested absolutely in the first tenant in tail.

In *Lord Deerhurst v. the Duke of St. Albans* (r) the testator bequeathed the chattels to trustees upon trust to permit A. to have the use during her life, remainder to his son during his life, and after the decease of the survivor of them that the trustees should stand possessed of the same goods, &c., "in trust for such person as should from time to time be Lord Vere, it being the testator's will and intention that the same should, after the decease of A., go and be held and enjoyed with the title of the family, so far as the rules of law and equity would permit;" and Sir John Leach said, "The question first made is, whether, after the death of the survivor of his wife and son, there is a direct gift, or only an executory trust to be rectified by the Court. The expression, 'upon trust for such person as shall from time to time be Lord Vere,' are plainly words of direct gift. Then follows, not further words of direct gift, but a declaration of his intention and motive in making the disposition. In this view of the case there is a direct gift and nothing executory."

The last case we have to mention is, *Stratford v. Powell* (s), in which the words of the will were, "To A. B. and C. and their heirs, (each in due succession as named, with usual limitations, each taking and bearing the name and arms of Stratford, and in default thereof to go to the next successor,) I bequeath the whole of my

(r) 5 Mad. 232.

(s) 1 B. & B. 1.

real, personal, and acquired property;" and Lord Manners took a manifest distinction between executory trusts in wills and executory trusts in articles; and, notwithstanding the case of *The Duke of Newcastle v. The Countess of Lincoln*, which was decided upon articles, considered himself bound by the case of *Vaughan v. Burslem*, which was determined on a will, and decreed the absolute property to have vested in the first tenant in tail.

From the cases we have reviewed, the reader will be warranted, perhaps, in drawing the following conclusions.

1. That a clause merely directory, without any words of direct gift, will be construed to raise an executory trust (*t*).

2. That words of direct gift, whether immediately to the parties themselves, or to a person in trust for them, though accompanied by the words "so long as the rules of law and equity will permit," will be taken to be a trust executed (*u*).

3. That the same construction will prevail, though the words of direct gift be accompanied by an explanatory clause, such as "my will and intention being," &c. (*x*).

4. That, although the trust be executory, the Court will not, as in articles, insert a limitation over on the death of the tenant in tail under twenty-one (*y*), even should the will contain the words, "so long as the rules of law and equity will permit (*z*)."

But,

(*t*) *Gower v. Grosvenor*, 5 Mad. 349, *S. C.* Barn. 62, *per* Lord Hardwicke; *Trafford v. Trafford*, 3 Atk. 349, *per eundem*; and see Lord Eldon's observations, *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 230.

(*u*) *Foley v. Burnell*, 1 B. C. C. 274; *Carr v. Erroll*, 14 Ves. 478.

(*x*) *Lord Deerhurst v. Duke of St. Albans*, 5 Mad. 232; *Foley v. Burnell*, 1 B. C. C. 274.

(*y*) *Stratford v. Powell*, 1 B. & B. 1.

(*z*) *Vaughan v. Burslem*, 3 B. C. C. 101; and see *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 394.

5. Should the testator express his intention clearly to have the heir-looms made inalienable for a longer period, and one sufficiently defined, there is no decision, as there appears to be no reason, why the Court should not execute such a lawful direction (*a*).

Again, in *wills*, if the words taken in their usual sense would create a jointenancy, the Court has no authority, as it has in articles, to execute the trust by giving a tenancy in common; but, where the testator has shewn a desire of providing for his children (*b*), or putting himself *in loco parentis* for his grandchildren (*c*), the Court has adopted the same construction, as in articles: but, in the cases, which have occurred, there has always been some accompanying circumstance to denote a tenancy in common, as the estate really intended.

We shall conclude with a few observations that appear applicable to the execution of settlements whether in pursuance of *articles* or *wills*.

If the testator or contracting parties give no directions as to the insertion of powers, the Court cannot, upon the ground of implied intention, order a power to be introduced (*d*). If the authority be expressed in general terms, as to insert all *usual* powers, the trustees may then introduce powers of leasing for twenty-one years (*e*), of sale and exchange (*f*), and of appointment of new trustees (*g*); and, it seems, where the property is joint, or

(*a*) See the concluding observation of Lord Thurlow in *Vaughan v. Burslem*, 3 B. C. C. 106.

(*b*) *Marryat v. Townly*, 1 Ves. 102.

(*c*) *Synge v. Hales*, 2 B. & B. 499.

(*d*) *Wheate v. Hall*, 17 Ves. 80, see 85; and see *Brewster v. An-*

gell, 1 J. & W. 628.

(*e*) See *Hill v. Hill*, 6 Sim. 144; *The Duke of Bedford v. The Marquis of Abercorn*, 1 Myl. & Cr. 312.

(*f*) *Hill v. Hill*, 6 Sim. 136; *Peake v. Penlington*, 2 V. & B. 311; and see *Williams v. Carter*,

Append. to Treat. of Powers, No. 5. (*g*) *Lindow v. Fleetwood*, 6 Sim.

contains mines, or is fit for building, they may also insert powers of partition, of leasing mines, and of granting building leases (*h*). "But there is a palpable distinction," said Sir Lancelot Shadwell, "between powers for the management and better enjoyment of the settled estate, as powers of leasing, of sale and exchange, &c., which are beneficial to all parties, and powers which confer personal privileges on particular parties, such as powers to jointure, to charge portions, to raise money for any particular purpose, &c. (*i*)."

The latter therefore may not be introduced under a direction to insert *usual* powers, for they have the effect of diminishing the *corpus* of the settled estate, and the Court has no rule by which to determine the *quantum* of the charge (*k*). And if the will or articles direct the insertion of some particular powers by name, then, as *expressio unius exclusio alterius*, the meaning of the words 'usual powers' will be materially qualified. Thus, where it was stipulated, that the settlement should contain a power of leasing for 21 years in possession, a power of sale and exchange, of appointment of new trustees, and *other usual powers*, it was held, that a power of granting building leases could not be inserted (*l*). So, if the trustees be authorized to insert a power of sale and exchange of estates in the county of Hereford, and *all other usual powers*, they would not be justified in extending the power of sale and exchange to estates lying in a different county (*m*). And where a testator directed that the settlement should contain all proper powers for making

152; *Brewster v. Angell*, 1 J. & W. 628, per Lord Eldon.

(*h*) See *Hill v. Hill*, 6 Sim. 145; *The Duke of Bedford v. The Marquis of Abercorn*, 1 Myl. & Cr. 312.

(*i*) *Hill v. Hill*, 6 Sim. 144.

(*k*) *Higginson v. Barneby*, 2 S. & S. 516, see 518.

(*l*) *Pearse v. Baron*, Jac. 158.

(*m*) *Hill v. Hill*, 6 Sim. 141, per Sir L. Shadwell.

leases, and *otherwise according to circumstances*, and that provision should also be made for the appointment of new trustees, and the Court was asked to insert a power of sale and exchange, Lord Eldon said, "It was held by Sir W. Grant, that, unless the insertion of a power were authorized by the direction to make a settlement, it could not be introduced, and if, where nothing is expressed, nothing can be implied, it is impossible, where something is expressed, I can imply more than is expressed; and particularly where the will notices what powers are to be given (*n*)."² But, where a testator directed the insertion of powers of leasing, and sale or exchange or partition, and then added, "And my will is, that in such intended settlement shall be inserted all such other proper and reasonable powers, as are *usually* inserted in settlements of the like nature," and the question was raised, whether, under these words, a power of appointment of new trustees might be introduced, Lord Cottenham, then M. R., said, "He had referred to the will, and as he found that the general words were in a separate and distinct sentence, he was of opinion they would authorize the insertion of the power (*o*)."³

A testator had directed the insertion of all *proper* powers for making leases or otherwise, to be reserved to the *tenants for life*, while qualified to exercise them, and, whenever disqualified, to the *trustees*. In the execution of the settlement, a power of sale and exchange was introduced, and was *limited to the trustees with the consent of the tenant for life*; but, it was held by Lord Eldon, that the insertion of the power in that mode was not in con-

(*n*) *Brewster v. Angell*, 1 J. & W. 625; and see *Horne v. Barton*, Jac. 439. (*o*) *Lindow v. Fleetwood*, 6 Sim. 152.

formity with the instructions (*p*). It was afterwards debated before Sir T. Plumer, whether a power of sale and exchange could, in any form, be admitted; when his Honor said, "The first point to be considered is, in whom the powers are to be invested; and it is clear they are to be given to the tenants for life, if qualified, and, if they should not be able to act, to the trustees. Now, if the power of sale and exchange is to be given to the tenant for life without check or control, I cannot say that it is a proper power; on the contrary it may be very dangerous, as the tenant for life may, for many reasons, be induced to sell, when it may not be for the benefit of the remaindermen; nor is it usual to give him this power without the check of requiring the assent of the trustees. Take it the other way: if the tenant for life is disqualified, as by infancy, can the Court say it is a proper power to be given exclusively to the trustees?" And therefore his Honor thought the power of sale and exchange could not be introduced (*q*).

II. Of indirect or constructive trusts.

Wherever a person, having a power of disposition over property, manifests any intention with respect to it in favour of another, the Court, where there is no want of consideration, will execute that intention, through the medium of a trust, however informal the language in which it happens to be expressed.

Thus, if a person contract to sell another an estate, the vendor has impliedly declared himself a trustee in fee for the benefit of the purchaser (*r*).

(*p*) *Brewster v. Angell*, 1 J. & W. 625.

(*r*) See Vend. and Purch. ch. 4, sect. 1.

(*q*) *Horne v. Barton*, Jac. 437.

So, if a testator direct his lands to be sold (*s*), or charge his realty with debts and legacies (*t*), or with any particular legacy (*u*), the legal estate may descend to the heir, or it may pass to a devisee; but the Court will view the direction as a declaration of trust, and will enforce the execution of it against the legal proprietor.

And a testator will sufficiently manifest an intention of creating a trust, if he employ words precatory, or commendatory, or expressing a belief (*x*), as if he “desire (*y*),” “will (*z*),” “request (*a*),” “will and desire (*b*),” “wish and request (*c*),” “entreat (*d*),” “most heartily beseech (*e*),” “order and direct (*f*),” “authorize and em-

(*s*) *Pitt v. Pelham*, 2 Freem. 134; *S. C.* 1 Ch. Re. 283; *Locton v. Locton*, 2 Freem. 136; *Asby v. Doyl*, 1 Ch. Cas. 180; *Tenant v. Brown*, *Ib.*; *Garfoot v. Garfoot*, 1 Ch. Ca. 35; *S. C.* 2 Freem. 176; *Gwilliams v. Rowel*, Hard. 204; *Blatch v. Wilder*, 1 Atk. 420; *Carvill v. Carvill*, 2 Ch. Re. 301; *Cook v. Fountain*, 3 Sw. 592; *Bennet v. Davis*, 2 P. W. 318, &c.

(*t*) *Passim*.
(*u*) *Wigg v. Wigg*, 1 Atk. 382.
(*x*) *Cary v. Cary*, 2 Sch. & Lef. 189, *per* Lord Redesdale; *Paul v. Compton*, 8 Ves. 380, *per* Lord Eldon.

(*y*) *Harding v. Glyn*, 1 Atk. 469; *Mason v. Limbury*, cited *Vernon v. Vernon*, Amb. 4; *Lawless v. Shaw*, L. & G. 154; *Trot v. Vernon*, 8 Vin. 72; *Pushman v. Filliter*, 3 Ves. 7; *Brest v. Offley*, 1 Ch. Rep. 246; *Cary v. Cary*, 2 Sch. & Lef. 189; *Cruwys v. Colman*, 9 Ves. 319.

(*z*) *Eales v. England*, Pr. Ch. 200; *Cloudsly v. Pellham*, 1 Vern. 411.

(*a*) *Nowlan v. Nelligan*, 1 B. C. C. 489; *Pierson v. Garnet*, 2 B. C. C. 38; *S. C.* affirmed, *Id.* 226; *Eade v. Eade*, 5 Mad. 118.

(*b*) *Birch v. Wade*, 3 V. & B. 198; *Forbes v. Ball*, 3 Mer. 437.

(*c*) *Foley v. Parry*, 5 Sim. 138; affirmed, 2 M. & K. 138.

(*d*) *Prevost v. Clarke*, 2 Mad. 458; *Meredith v. Heneage*, 1 Sim. 553, 555, *per* Chief Baron Wood; and see *Taylor v. George*, 2 V. & B. 378.

(*e*) *Meredith v. Heneage*, 1 Sim. 553, *per* Chief Baron Wood.

(*f*) *Cary v. Cary*, 2 Sch. & Lef. 189.

power (g)," "recommend (h)," "hope (i)," "do not doubt (k)," "be well assured (l)," "have the fullest confidence (m)," or use such expressions as "of course the legatee will give (n)," "in consideration the legatee has promised to give (o)," &c.

But such a construction will not prevail where either the objects intended to be benefited are imperfectly described (p), or the amount of the property, to which the trust should attach, is not sufficiently defined (q);

(g) *Brown v. Higgs*, 4 Ves. 708; 5 Id. 495; affirmed, 8 Ves. 561; and in D. P. 18 Ves. 192.

(h) *Tibbits v. Tibbits*, 19 Ves. 656; *S. C.* Jac. 317; *Horwood v. West*, 1 S. & S. 387; *Paul v. Compton*, 8 Ves. 380, per Lord Eldon; *Malim v. Keighley*, 2 Ves. jun. 333; *Meredith v. Heneage*, 1 Sim. 553, per Chief Baron Wood; and see *Meggison v. Moore*, 2 Ves. jun. 630; *Sale v. Moore*, 1 Sim. 534. Note, as to *Cunliffe v. Cunliffe* (Amb. 686) see *Pierson v. Grant*, 2 B. C. C. 46; *Malim v. Keighley*, 2 Ves. jun. 532; *Pushman v. Filliter*, 3 Ves. 9.

(i) *Harland v. Trigg*, 1 B. C. C. 142; and see *Paul v. Compton*, 8 Ves. 380.

(k) *Parsons v. Baker*, 18 Ves. 476; *Taylor v. George*, 2 V. & B. 378; and see *Sale v. Moore*, 1 Sim. 534.

(l) *Macey v. Shurmer*, 1 Atk. 389; *S. C.* Amb. 520. See *Ray v. Adams*, 3 M. & K. 237.

(m) See *Wright v. Atkyns*, 17

Ves. 255, 19 Ves. 299, Coop. 111, 1 T. & R. 143.

(n) *Robinson v. Smith*, 6 Mad. 194; but see *Lechmere v. Lavie*, 2 M. & K. 197.

(o) *Clifton v. Lombe*, Amb. 519.

(p) *Harland v. Trigg*, 1 B. C. C. 142; *Tibbits v. Tibbits*, 19 Ves. 664, per Lord Eldon; *Richardson v. Chapman*, 1 Burn's Eccles. Law, 245; *Pierson v. Garnet*, 2 B. C. C. 45, per Lord Kenyon; *S. C.* Id. 230, per Lord Thurlow; *Sale v. Moore*, 1 Sim. 534; *Cary v. Cary*, 2 Sch. & Lef. 189, per Lord Redesdale; *Meredith v. Heneage*, 1 Sim. 542, see 558, 559, 565.

(q) *Lechmere v. Lavie*, 2 M. & K. 197; *Meredith v. Heneage*, 1 Sim. 556; *Buggins v. Yates*, 9 Mod. 122; *Sale v. Moore*, 1 Sim. 534; Anon. case, 8 Vin. 72; *Tibbits v. Tibbits*, 19 Ves. 664, per Lord Eldon; *Wynne v. Hawkins*, 1 B. C. C. 179; *Pierson v. Garnet*, 2 B. C. C. 45, per Lord Kenyon; *S. C.* Id. 230, per

for the difficulty that would attend the execution of such imperfect trusts is converted by the Court into an argument that no trust was really intended (*r*).

The objects have been held to be uncertain, where *personal estate* has been given to A., with a hope "that he would continue it in the *family* (*s*);" but, where *freeholds* were so devised, it was held that by "family," was to be understood the worthiest member of it, viz. the heir at law (*t*). In another case *both real and personal estate* were blended together, and given to A. in full confidence that she would devise the whole of the estate to "such of the heirs of the testator's father as she might think best deserved a preference," and the Court could not determine whether the heirs were intended, or the next of kin, or both (*u*). A residuary estate was bequeathed to A., with a recommendation that she would "consider the testator's *relations*." Sir A. Hart asked, "Who are the objects of the trust? Did the testator mean relations at his own death, or at A.'s death? Did he mean that she should have the liberty of executing the trust the day after his death?" And his Honour was of opinion, that no trust could attach (*x*).

Lord Thurlow; *Bland v. Bland*, 2 Cox 349; *Le Maitre v. Bannister*, cited in note to *Eales v. England*, Pr. Ch. 200; *Sprange v. Barnard*, 2 B. C. C. 585; *Pushman v. Filliter*, 3 Ves. 7; *Attorney-general v. Hall*, Fitzg. 314; *Wilson v. Major*, 11 Ves. 205; *Eade v. Eade*, 5 Mad. 118; *Curtis v. Rippon*, 5 Mad. 434.

(*r*) *Morice v. Bishop of Durham*, 10 Ves. 536, *per* Lord Eldon.

(*s*) *Harland v. Trigg*, 1 B. C. C. 142; but see *Wright v. Atkyns*, Coop. 121.

(*t*) *Atkyns v. Wright*, 17 Ves. 255; *S. C.* 19 Ves. 299; *S. C.* Coop. 111; and see *S. C.* 1 Turn. & Russ. 143.

(*u*) *Meredith v. Heneage*, 1 Sim. 542, see 558, 559, 565; but see *Wright v. Atkyns*, Coop. 119.

(*x*) *Sale v. Moore*, 1 Sim. 534, see 540; but see *Wright v. Atkyns*, Coop. 119—123.

But there can be no uncertainty of the objects where such a trust is to be executed by *will*, for then those who answer the description at the death of the donee of the power must be the parties contemplated (*y*).

The Court has refused to establish the trust from the uncertainty of the subject, where the recommendation has been to "consider certain persons (*x*)," "to be kind to them (*a*)," "to do justice to them (*b*)," "to use the property for herself and her children, and to remember the Church of God, and the poor (*c*)," "to give what shall remain at his death, or what he shall die seised or possessed of (*d*);" and in short, wherever the donee of the property has had a power to dispose of any part, whether expressly given him, or arising from implication, or from the nature of the subject (*e*). But, where the recommendation was, that the legatee, in case she married again, should settle what she possessed under the testator's will to her separate use, and should bequeath what she should die possessed of under the will in favour of certain persons, it was held the *whole* personal estate was overreached by the trust. Sir John Leach said, "The testator directs

(*y*) *Pierson v. Garnet*, 2 B. C. 434.

C. 38; *S. C.* Id. 226; *Atkyns v. Wright*, 17 Ves. 255; *S. C.* 19 Ves. 299; *S. C.* Coop. 111; and see *S. C.* 1 Turn. & Russ. 162; *Meredith v. Heneage*, 1 Sim. 558. But see *Wright v. Atkyns*, Coop. 119—123.

(*z*) *Sale v. Moore*, 1 Sim. 534.

(*a*) *Buggins v. Yates*, 9 Mod. 122.

(*b*) *Le Maître v. Bannister*, Pr. Ch. 200, note (1).

(*c*) *Curtis v. Rippon*, 5 Mad.

(*d*) *Sprange v. Barnard*, 2 B. C. C. 585; *Pushman v. Filliter*, 3 Ves. 7; *Wilson v. Major*, 11 Ves. 205; *Eade v. Eade*, 5 Mad. 118; *Wynne v. Hawkins*, 1 B. C. C. 179; *Lechmere v. Lavie*, 2 M. & K. 197; *Bland v. Bland*, 2 Cox, 349; *Attorney-General v. Hall*, Fitzg. 314; and see *Meredith v. Heneage*, 1 Sim. 556; *Tibbits v. Tibbits*, 19 Ves. 664.

(*e*) *Malim v. Keighley*, 2 Ves. jun. 531, per Lord Loughborough.

that upon a marriage, whenever a second marriage may happen, the whole of the property shall be secured, and a power to dispose of any part of the property absolutely, at any time during her life, is not to be reconciled to that provision. I must, therefore, consider, that, when he recommends her to give what she shall die possessed of, he had in view the whole property which she should possess under his will (*f*)."

And where both objects and property are certain, yet no trust will arise, if, all circumstances considered, it is more probable the testator meant to communicate a mere discretion (*g*); as if he at the same time declare the estate shall be "unfettered and unlimited (*h*)," or if the gift be absolutely to A., with the words, *in a parenthesis*, "to enable him to assist such of the children of B. as he shall find deserving of encouragement (*i*)."

The construction of the words we are considering never turns on their grammatical import: they may be imperative, but are by no means necessarily so (*k*).

And if a trust be created, it does not follow that it shall be equally restrictive, as where the trust is properly such. Thus an estate was devised to A. and her heirs "in the fullest confidence," that after her decease she would devise the property to the family of the testator, and Lord Eldon asked, "Is there any case in which the doctrine has been carried so far, that the tenant in fee

(*f*) *Horwood v. West*, 1 S. & S. 387.

(*h*) *Meredith v. Heneage*, 1 Sim. 542; *S. C.* 10 Price, 230.

(*g*) *Bull v. Vardy*, 1 Ves. jun. 270; *Meggison v. Moore*, 2 Ves.

(*i*) *Benson v. Whittam*, 5 Sim. 22.

jun. 630; *Hill v. Bishop of London*, 1 Atk. 618; and see *Paul v. Compton*, 8 Ves. 380.

(*k*) *Meggison v. Moore*, 2 Ves. jun. 632, *per* Lord Loughborough.

shall not be at liberty, with respect to timber and mines, to treat the estate in the same husbandlike manner as another tenant in fee?" and his Lordship said, he should hesitate a long time before he held, that the person bound by the trust was not entitled to cut timber in the ordinary management of the property (*l*). And so it was afterwards decided by the House of Lords on appeal (*m*).

The current of decisions has of late years been against the doctrine of converting the devisee or legatee into a trustee (*n*).

(*l*) See *Wright v. Atkyns*, Turn. & Russ. 157, 163.

(*n*) *Sale v. Moore*, 1 Sim. 540; and see *Meredith v. Heneage*, Id.

(*m*) See *Lawless v. Shaw*, Lloyd & Gould, 164. 566.

CHAPTER VI.

WHO MAY BE TRUSTEE.



THE trustee, it must be observed, is merely the nominal instrument for executing the intention; and therefore, if only the terms of the trust can be sufficiently ascertained, the Court, where there is no want of consideration, will not suffer the trust to fall to the ground, because the party, who created it, has neglected to name a person to administer it. However, generally, and most regularly, an express trustee is appointed, and therefore we shall proceed to consider the two following questions, first, Who will be bound by the trust; and, secondly, To whom the administration of the trust may properly be confided.

I. Who will be bound by the trust.

The technical rules that excluded many persons from being seised to a use, have long since ceased to operate with respect to the system of trusts; and it may now be stated generally, that all, who are capable of purchasing the legal estate of property, whether tenants in tail (*a*), tenants by the curtesy (*b*), or in

(*a*) *Cloudsly v. Pellham*, 1 Vern.
411.

(*b*) *Bennet v. Davis*, 2 P. W.
319.

dower (*c*), tenants by *elegit* (*d*), judgment creditors taking in execution (*e*), or bodies corporate (*f*), are compellable by *subpœna* to permit the *cestui que trust* to have the beneficial enjoyment.

Perhaps an exception must still be made in the case of property vested in the King; not because there is no recognition of the right (*g*), but because the law has not armed the subject with any definitive remedy; for the court of Chancery, the only *forum* of trusts, "has no jurisdiction over the King's conscience, for that it is a power delegated by the King to the Chancellor to exercise the King's equitable authority betwixt subject and subject (*h*)."

But as the court of Exchequer has, in its character of a court of revenue, an especial superintendence over the royal property, perhaps, through that channel, a *cestui que trust* may indirectly reach the estate, to which on the general principles of equity he is confessedly entitled. No such jurisdiction, however, appears to have been known when Lord Hale was Chief Baron (*i*); but Lord

(*c*) *Pawlett v. Attorney-General*, Hard. 469, per Lord Hale; *Noel v. Jevon*, 2 Freem. 43; *Hinton v. Hinton*, 2 Ves. 634, per Lord Hardwicke.

(*d*) *Finch v. Earl of Winchelsea*, 1 P. W. 277; *Kennedy v. Daly*, 1 Sch. & Lef. 355, see 373.

(*e*) *Foley v. Burnell*, 1 B. C. C. 278, per Lord Thurlow.

(*f*) See *Attorney-General v. Landerfield*, 9 Mod. 286; *Dummer v. Corporation of Chippenham*, 14 Ves. 252; *Green v. Rutherford*, 1 Ves. 468; *Attorney-General v.*

Whorwood, 1 Ves. 536; *Attorney-General v. Mayor of Stafford*, Barn. 33; *Attorney-General v. Foundling Hospital*, 2 Ves. jun. 46; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499.

(*g*) See *Pawlett v. Attorney-General*, Hard. 467, 469; *Burgess v. Wheate*, 1 Ed. 255.

(*h*) Said by counsel in *Pawlett v. Attorney-General*, Hard. 468.

(*i*) See *Pawlett v. Attorney-General*, Hard. 467, 469; and see *Wikes's case*, Lane, 54.

Hardwicke once observed in Chancery, "I will not decree a trust against the Crown in this court, but it is a notion established in courts of revenue by modern decisions, that the King may be a *royal trustee* (*k*).¹ The doctrine was still unsettled in the time of Lord Northington (*l*), and has not been set at rest by any subsequent decision. The subject may undoubtedly sue the Crown by preferring a petition of right (*m*).²

It has been said that a wife cannot be a trustee for her husband (*n*); but the observation must be construed to mean, not that, if a legal estate be vested in a wife upon trust for her husband, the Court would not execute the intention, but that, if a husband take a purchase in the name of his wife, (the case which elicited the remark,) the Court will consider the purchase, not as a trust for the husband, but as an advancement for the wife.

It has also been said, that a person cannot be a trustee, unless there be vested in him an actual interest (*o*); but, in consideration of equity, a person may be trustee of a mere power; for if A. be directed to sell an estate, and apply the proceeds in payment of debts, and the authority be imperative, the Court, though nothing passed by way of interest, will look upon A. as a trustee, and if he decline the office, or neglect the execution of

(*k*) *Penn v. Lord Baltimore*, 1 Ves. 453; and see *Reeve v. Attorney-General*, 2 Atk. 224; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 617. 172, per Dolben, J.; *Reeve v. Attorney-General*, cited *Penn v. Lord Baltimore*, 1 Ves. 446.

(*n*) *Kingdome v. Bridges*, 2 Vern. 68, per Lord Jeffries.

(*l*) See *Burgess v. Wheate*, 1 Ed. 255.

(*o*) *Owen v. Owen*, 1 Atk. 496, per Lord Hardwicke.

(*m*) *Scounden v. Hawley*, Comb.

it, will itself order the sale and the proper application of the proceeds (*p*).

The Bank of England cannot be made a trustee, for the Company will not enter notice of instruments *inter vivos* upon their books ; and though they are obliged by certain acts of parliament to enter the wills, or at least extracts from the wills of deceased proprietors of stock, the object of the legislature, as the Court has now clearly determined, was not to make the Company responsible for the due administration of the fund according to the equitable right, but to enable them to ascertain who under the will were the persons legally entitled (*q*) (8).

(*p*) See *infra*.

Parsons, 5 Ves. 665 ; *Bank of*

(*q*) *Hartga v. Bank of England*, *England v. Lunn*, 15 Ves. 583, per 3 Ves. 55 ; *Bank of England v. Lord Eldon*.

(8) By an act of William & Mary (4 W. & M. c. 3, s. 10) the will was directed to be entered in the Receipt Office of the Exchequer, where the annuities were then payable ; but, by a subsequent act in the same reign (5 W. & M. c. 20, s. 20) the Bank was incorporated, and by statutes of George the First, and George the Second (1 Geo. 1, st. 2, c. 19, s. 12 ; 30 Geo. 2, c. 19, s. 49) it was enacted, that " a person possessed of stock might devise the same by will in writing, attested by two credible witnesses ; but that such devisee should receive no payment thereon, till so much of the will as related to the said stock should be entered in the office of the Bank ; and in default of such devise, the stock should go to the executors or administrators."

Upon the effect of these provisions it has been held, 1st. That although stock be specifically devised, and the will be duly attested by two witnesses, yet, until the executors assent to the specific bequest, the legal property of the stock remains vested in the executor, and, if it be necessary to make use of it as assets, he may bring an action at law against the Bank for refusing a transfer in obedience to his directions. *Franklin v. The Bank of England*, 9 B. & C. 156. And of course the Bank cannot obtain an injunction in equity against the legal proceedings ; *Bank of England v. Moffat*, 3 B. C. C. 260 ; *Bank of England v. Lunn*, 15 Ves.

Were the construction to be otherwise, the Bank of England would be trustee for half the families in the kingdom.

569; *Bank of England v. Parsons*, 5 Ves. 665; for, as Lord Eldon observed, if the executor cannot maintain an action at law, the Bank has no need of assistance from a court of equity, and if he can maintain his action, then he must be authorized to do so by the statute, and equity cannot interfere. *Bank of England v. Lunn*, 15 Ves. 583. Lord Thurlow once expressed an opinion that the devise of stock was in the nature of a parliamentary appointment, and did *not* require the executor's assent; *Pearson v. Bank of England*, 2 Cox, 178, 179; but he afterwards changed his opinion, and conceived the executor's assent to be necessary, as in a specific devise of leaseholds. *Bank of England v. Moffat*, 3 B. C. C. 263; compare *Bank of England v. Parsons*, 5 Ves. 668. Lord Eldon said, that, as, by a clause in the act, stock could not be attached, sequestered, or taken in execution, during the lifetime of the holder, he had always doubted whether the legislature did not intend to give it a peculiar value, by enabling the party to devise it, like land, independently of the executor; but, his Lordship said, the construction adopted in practice was, that, though specifically bequeathed, it must have the executor's assent, and was liable, as assets, to the payment of debts; *Bank of England v. Lunn*, 15 Ves. 517, 518; and so the law is now clearly settled. 2ndly, There is no doubt, that, after the executor's assent, the specific legatee, if the will was attested by two witnesses, becomes the perfect legal proprietor, and may bring an action at law against the Bank for refusing to transfer into his name. See *Bank of England v. Lunn*, 15 Ves. 518, and following pages. 3rdly, If the stock be specifically bequeathed, but the will be not attested by two witnesses, then the legal property of the funds vests absolutely in the executor; but, as the act does not express how the executor shall apply it, the Court considers him to hold it upon trust, subject to the payment of debts, for the person to whom it was informally devised. The legatee can of course have no *legal* interest in the stock until the executor has made an actual transfer to him. See *Bank of England v. Lunn*, 15 Ves. 578; *Rider v. Kidder*, 10 Ves. 369; *Ripley v. Waterworth*, 7 Ves. 440, 452.

What will amount to a specific legacy of stock, it may sometimes be extremely difficult to determine. Lord Thurlow is said to have considered that a devise of stock, included in a general residue, could not be construed a specific bequest; *Bank of England v. Moffat*, 3 B. C.

As the Bank is not bound to notice even the contents of the will beyond the legal devise, so, *a fortiori*, it will pay no attention to agreements of parties *inter se*, by which the interests taken under the will have subsequently shifted from one person to another; as, if stock be devised to A. for life, with remainder to B., and A. assign to B., or B. release to A., though in equity the whole beneficial interest has thus become vested in A. or B., the Bank will not permit a transfer during the life of A. to the one or the other; but, on A.'s decease, will transfer to B. or his personal representative. However, a suit may be instituted for the purpose of compelling the Bank to transfer according to the equitable title; but, the refusal of the Company to act without the order of the Court will be considered as justifiable and proper,

C. 260; compare *Bank of England v. Parsons*, 5 Ves. 668; and Lord Loughborough put the same construction upon a general bequest of all the testator's personal estate; *Bank of England v. Parsons*, 5 Ves. 665; but Lord Eldon justly observed, that, if the testator had the stock at the date of the will, and the will was attested by two witnesses, the stock would pass as effectually as if it were given *eo nomine*, or as leasehold estate or any other property would belong to the general devisee or legatee. *Bank of England v. Lunn*, 15 Ves. 581. The act, speaking of persons "possessed" of stock, (which must be looked upon as equivalent to "having" in the statute of wills,) it follows, there can be no specific bequest, where the testator was not the proprietor of it at the date of the will. See *Bank of England v. Lunn*, 15 Ves. 577, 578. But though a general bequest would not pass the *legal* estate of stock subsequently acquired, it would serve as a direction to the executor to whom, after payment of debts &c., to transfer it. If a person possessed of stock desire the executor to set apart a certain portion of it in favour of A., and the executor make the appropriation, as by selling out the residue, and permitting A. to enjoy what is left standing in the testator's name, this, it seems, is a specific bequest, and the executor, by the appropriation of it, has given his assent to it. See *Bank of England v. Lunn*, 15 Ves. 582, 583.

and therefore the Bank in such suits will be allowed their costs (*r*).

II. To whom the administration of the trust may properly be confided.

The fitness of a person to discharge the office of trustee must depend on his capacity to exercise the discretionary part of the trust, and his ability to join in the requisite assurances of the property.

It would not be advisable to select a *feme covert* as trustee (*s*); not that she has any want of sufficient discretion for the due execution of the trust, for a woman has no less judgment after marriage than before (*t*); nay, as was quaintly added by Sir John Trevor, she rather improves it by her husband's teaching (*u*). The reasons, upon which her disabilities are founded, are her own interest, or her husband's, or both (*x*); and, where these are not concerned, she possesses as much legal capacity as if she were perfectly *sui juris*: thus, she may execute powers simply collateral (*y*), and (somewhat contrary to principle) even powers appendant, or in gross (*z*). Now, at

(*r*) *Pearson v. Bank of England*, 2 B. C. C. 529; *Austin v. Bank of England*, 8 Ves. 522; *Marryatt v. The Bank*, and *Aynsworth v. The Bank*, cited *Ib.* 524, note (*b*).

(*s*) *Lake v. De Lambert*, 4 Ves. 595, *per* Lord Loughborough.

(*t*) *Compton v. Collinson*, 2 B. C. C. 387, *per* Buller, J.; *Hearle v. Greenbank*, 1 Ves. 305, *per* Lord Hardwicke; *Bell v. Hyde*, Pr. Ch. 330, *per* Sir John Trevor; and see marginal note to *Moore v. Hussey*,

Hob. 95; and see *Needler v. Bishop of Winchester*, Hob. 225.

(*u*) *Bell v. Hyde*, Pr. Ch. 330.

(*x*) *Compton v. Collinson*, 2 B. C. C. 387, *per* Buller, J.

(*y*) Co. Lit. 112, a; *Ib.* 187, b; *Lord Antrim v. Duke of Buckingham*, 2 Freem. 168, *per* Lord Keeper Bridgman; *Blithe's case*, *Id.* 91, *vid.* 2nd resolution; *Godolphin v. Godolphin*, 1 Ves. 23, *per* Lord Hardwicke.

(*z*) See Sugden on Powers, c. 3, sect. 1.

law, the trustee is considered as the sole and absolute proprietor, and therefore he can have no power, that does not flow from the legal ownership; but, in equity, the absolute interest is vested in the *cestui que trust*, and, as the trustee is regarded in the light of a mere nominal instrument, any authority communicated to him must have the character of a power simply collateral (*a*). It follows, that, if a discretionary trust be committed to a *feme covert*, there is nothing to prevent her due administration of it, so far as relates to her legal *judgment and capacity*.

But the inconvenience arising from the appointment of a *feme covert* as trustee proceeds from her inability to join in the requisite assurances. At common law, if lands be vested in a *feme covert* upon condition to enfeoff another, she may execute the feoffment by her own act, without the intervention of her husband (*b*); and hence it has been argued, that, in the case of a trust, she may, equally without her husband's concurrence, convey the estate to the parties *equitably* entitled (*c*). But between the two cases there is this clear and obvious distinction, that a *condition* is part and parcel of the common law, while a *trust* is only recognised in the *forum* of a court of equity; except, therefore, the trust be so worded as to bear the construction of a legal condition, it seems impossible to contend, that an instrument, otherwise inoperative, should, from the mere circumstance of the trust, which a court of law cannot notice, acquire a validity (*d*). Mr. Fonblanque suggests the additional

(*a*) See *infra*.

(*b*) *Daniel v. Ubley*, Sir W. Jones, 137.

(*c*) *Daniel v. Ubley*, Sir W. Jones, 138, *per* Whitlock, and Dod-

ridge, J.

(*d*) See Mr. Hargrave's *Observations*, Co. Lit. 112. a, note (6) and Mr. Fonblanque's *Treat. on Equity*, Vol. 1, p. 92.

reason, that, if a married woman were allowed to convey a trust estate without her husband's concurrence, she might convey it before the several objects of the trust were satisfied, for which he might, jointly with her, be responsible to the *cestui que trust* (*e*).

An *infant* labours under still greater disability than a *feme covert*; for, first, as regards judgment and discretion, a *feme* is admitted to *have* capacity, though she cannot in all cases freely exercise it, but an infant is said altogether to *want* capacity (*f*). An infant cannot be steward of the court of a manor (*g*), or attorney for a person in a suit (*h*), or guardian to a minor (*i*), or be a bailiff or receiver (*k*); but can only discharge such acts as are merely ministerial, as to be an attorney to deliver seisin (*l*), or, as lord of a manor, to give effect to the custom (*m*). So, as executor, he might, until a recent act, have been the channel or conduit pipe through which the assets found their way to the hands of the creditors in a due course of administration (*n*); but had he acted otherwise than ministerially, as by signing an acquittance without receipt of the money, such an exercise of discretion had been actually void (*o*).

(*e*) Treat. on Equity, Vol. 1, p. 92.

(*f*) *Hearle v. Greenbank*, 3 Atk. 712, and 1 Ves. 305, *per* Lord Hardwicke; *Grange v. Twining*, O. Bridg. 108, *per* Sir O. Bridgman; *Compton v. Collinson*, 2 B. C. C. 387, *per* Buller, J.; and see *Sockett v. Wray*, 4 B. C. C. 486.

(*g*) Co. Lit. 3. b.; and see Mr. Hargrave's note (4) Ib.

(*h*) Co. Lit. 128. a.; Br. Ab.

"Covert. and Infant." pl. 55; and see *Hearle v. Greenbank*, 3 Atk. 710.

(*i*) Co. Lit. 88. b.

(*k*) Co. Lit. 172. a.

(*l*) Co. Lit. 52. a.; Br. Ab.

"Covert. and Infant." pl. 55.

(*m*) 1 Watk. on Copyh. 24.

(*n*) Toller on Executors, 31.

(*o*) Russell's case, 5 Re. 27. a; Co. Lit. 172. a; Ib. 264. b.; 1 Roll. Ab. 730, F. 2.

It is suggested in Sir E. Sugden's *Treatise of Powers* (*p*), that an infant may exercise a power simply collateral; and no distinction is taken between powers that are ministerial and such as are discretionary. But the only authority cited in support of the position, is a passage from Dyer, that, "if a man makes his will, and wills that J. S., who is within age, shall have the disposition of his land, this is good (*q*);" but the note of the case is too brief to warrant any decisive inference; and besides, the power may have been a common law authority, to be executed by the infant for his own personal benefit.

In Brooke there is an *obiter dictum*, that an infant may exercise a power of sale (*r*); and Mr. Fearne expressed himself in favour of the same doctrine, but then his opinion was founded on this, that a power of sale is to be regarded as ministerial, and not as calling for the exercise of any discretion (*s*).

But the authority entitled to the greatest respect for distinguishing between ministerial and discretionary powers in an infant is the elaborate opinion of Lord Hardwicke in the well-known case of *Hearle v. Greenbanke* (*t*). An infant of the age of seventeen had proceeded to exercise a power appendant, and the validity of the execution was now the question before the Court. His Lordship divided the inquiry into two heads—1st, whether a power *generally* could be executed by an infant; and, 2ndly, whether the case before him could be distinguished by any *particular* circumstance. Upon the former branch

(*p*) C. 3, s. 1.

(*s*) F. P. W. 312. See *supra*,

(*q*) Reading on Wills, c. 1, chap. 2.

pl. 12.

(*t*) 3 Atk. 695; 1 Ves. 298.

(*r*) Br. Ab. "Devise," pl. 12.

of the subject his Lordship said (*u*), "There is no precedent, either in a court of law or equity, where it has been held that a power over real estate, executed by an infant, is good; and, as I can *find* no precedent for it, I will *make* none. As to the general question of powers, in the large sense of the word, there are several kinds of powers infants may execute; as where he is a mere instrument or conduit pipe, *where no prudence or discretion is required* (*x*), and his interest is not concerned. Lord Coke, in his Commentary on Littleton (*y*) says, 'Few persons are disabled to be private attorneys to deliver seisin; for monks, *infants*, feme coverts, may be attorneys.' The latter word is expressed generally, but must be taken to mean only attorneys to deliver seisin (*z*); for, Lord Coke himself, on another occasion, Co. Lit. 128. a., cites a passage out of the Mirror, in which it is expressly said, an infant cannot be an attorney in the sense of an attorney in a court of justice. Before the statute of uses the power was over the use, and all things necessary to be done over the legal estate were done by way of conditions. An infant might perform a condition where it was for his benefit, *as if he had an estate on condition to make a feoffment of part of it to B., or else to lose the whole* (*a*); but as to the exercise of the other kind of powers (*viz.* over the use), I find no sort of authority. It is said an infant may present to a church. What is the reason? Because a presentation is not a thing of profit, of which the guardian can make any benefit; but

(*u*) The report of Atkyns is followed, except where Vesey is excited.

(*x*) 1 Ves. 304.

(*y*) 52. a.

(*z*) This appears to be the sense, though neither reporter has exactly expressed it.

(*a*) 1 Ves. 305.

the strong ground the law goes on is, there can be no inconvenience, because the bishop is to judge of the qualification of the clerk presented. It has been said, an infant may declare the use of a fine or common recovery where he suffers it without a privy seal, and the use is good, and the fine and recovery shall stand. Why does the law allow it? Because there is no remedy; for, as the matter of record stands, the law supposes he was of full age, and will not presume that a judge or commissioners would take the fine upon any other terms; and the deed to lead the uses, being part of the fine, shall likewise stand: and therefore all this arises for want of a remedy. But it is said an infant may, by the custom of Kent, and of several manors, aliene his estate; and if he may do it by custom, why not by a power? Now, a custom is *lex loci*, and is presumed in law to have had a reasonable commencement, just the same as if a private act of parliament was made to give the infant such a power. Again, it has been said, that a *feme covert* may execute a power, and therefore why not an infant of the age of discretion; but I take it in law, that the disability of an infant, with respect to the real estate, is more favoured in law, and a stronger disability, than that of a *feme covert* (b). In a marginal note to the case of *Moore v. Hussey*, in Hobart 95, and which note is allowed to be his own, is this observation—'Coverture was not, at common law, so far protected as was infancy, and some other disabilities, *scilicet*, *non sanæ memoriæ*, &c.; for, a woman covert hath no less judgment than discover.' Her disability doth not arise from want of reason; and it is upon this ground that the separate examination of a *feme covert* is good, because, when delivered from her

(b) 1 Ves. 305.

husband, her judgment is free ; *but no examination of an infant will make his recovery good* (c), for an infant's disability is altogether from want of capacity. It is insisted, that here is no sort of inconvenience ; for the infant, being above the age of seventeen years, was as discreet as if she had attained the age of twenty-one, and the Court may judge whether she had discretion enough to execute such a power. This is of such latitude and extent, that I own I should be very sorry, as presiding in a court of justice, to be intrusted with it ; *for there is a variety of opinions of people's judgment* (d), and it does not come in question till after the death of the infant, and no personal inquiry or examination can then be had of her judgment and discretion. For this I refer to Hobart 225—'In pleading, an age certain must be set down, and not left upon telling twelve-pence, or measuring a yard of cloth, as some books are, that the Court may judge of an age of discretion ; for custom must not abrogate the law of nature.' The law will not admit it in the case of a custom ; then why should it in the execution of a power ? *Taking it, therefore, in general, I am of opinion that an infant cannot execute a power* (e). But, next, it must be considered, whether there is any thing in this case *particularly* to the purpose, and I think there is—first, upon the penning of the power ; secondly, as it is a power coupled with an interest ;" and, after some observations upon the former head, his Lordship proceeded thus—"The construction of law on such a power as the present, which is coupled with an interest, is very different from a naked power over another person's estate, and that distinction has been taken in the cases of *feme*

(c) 1 Ves. 305.

(d) 1 Ves. 306.

(e) 1 Ves. 306.

coverts. It was admitted, that, if this power was to operate on the estate of the infant, it might not be good. Now it is clearly so, for she had the trust in equity for life, with the trust of the inheritance in her in the mean time, which would remain in herself if not disposed of, and descend to her heir, so that this is directly a power over her own inheritance, which cannot be executed by an infant (*f*)."

Thus Lord Hardwicke took the distinction between general powers and powers appendant, and delivered his opinion, after the maturest consideration, that an infant could not exercise the former, *if requiring the application of prudence or discretion*.

Upon the subject of an infant's ability to pass the legal estate, it will be proper to inquire, first, What is the immediate effect of an infant's assurance; and, secondly, How far he is precluded from avoiding it by any subsequent act.

1. As regards the immediate effect of an infant's assurance, it seems to be generally agreed, that a feoffment of lands (*g*), or an actual delivery of goods and chattels (*h*), is an act of so great solemnity, that it serves to pass the present possession, and is voidable only, and not void.

Where the property is of an incorporeal nature, as the delivery of the thing itself is impossible, the common law has substituted the kindred precaution of delivery of the deed. The effect of a deed delivered by an infant has

(*f*) 1 Ves. 306.

8 Co. 42. b. ; Br. Ab. "Covert. and Inf." pl. 40.

(*g*) *Thompson v. Leach*, 3 Mod.

311, *per cur.* ; Br. Ab. "Covert. and Inf." pl. 1 ; and see Co. Lit.

(*h*) Perk. 14 ; Br. Ab. "Covert. and Inf." pl. 1.

42. b., 51. b. ; *Whittingham's case*,

been much disputed : by some it has been held to be absolutely null and void (*i*), by others to be voidable only (*k*), and by others again to be void or voidable, as the validity of the execution is taken to be for the infant's benefit or not (*l*). Another opinion still (which is that of Perkins (*m*), and was adopted in the case of *Zouch v. Parsons* (*n*), and may therefore be regarded as the doctrine of the present day,) is, that an infant's deed, where the delivery of it answers to livery of seisin, and operates as the conveyance of an interest, is merely voidable ; but where it does not take effect as an assurance by delivery of the hand, as in a power of attorney (*o*), it is then actually void. Lord Mansfield, however, subjoined the qualification, that, if a case should arise, where it would be more beneficial to the infant that the deed should be considered as void ; as, if he might incur a forfeiture, or be subject to damage, or a breach of trust in respect of a third person (*p*), unless it was deemed void, the reason of an infant's privileges would in such case warrant an exception from the rule (*q*).

(*i*) Br. Ab. "Covert. and Inf." pl. 1 & 10 ; *Lloyde v. Gregory*, Cr. Car. 502, *per cur.* ; *Thompson v. Leach*, 3 Mod. 310, *per cur.* See observations on the two last cases in *Zouch v. Parsons*, 3 Burr. 1806 & 1807 ; and see *Humphreston's case*, 2 Leon. 216.

(*k*) *Norton v. Turvil*, 2 P. W. 145, *per* Sir J. Jekyll.

(*l*) See *Zouch v. Parsons*, 3 Burr. 1804 ; and see *Humphreston's case*, 2 Leon. 216 ; *Lloyde v. Gregory*, Cr. Car. 502 ; *Nightin-*

gale v. Earl Ferrers, 3 P. W. 210.

(*m*) Sects. 12 and 154 ; and see Br. Ab. "Dum fuit infra ætatem," pl. 1 ; Id. "Covert. and Inf." pl. 12 ; *Stone v. Wythipole*, Cr. El. 126 ; *Marlow v. Pitfield*, 1 P. W. 559.

(*n*) 3 Burr. 1807.

(*o*) See Br. Ab. "Covert. and Inf." pl. 1 ; *Whittingham's case*, 8 Co. 45. a.

(*p*) *Quære* if a court of law could notice a breach of trust.

(*q*) *Zouch v. Parsons*, 3 Burr. 1807.

Where the instrument *carries no solemnity*, the validity of the act must then depend on the question, how far the assurance promotes the interest of the infant. Thus in *Humphreston's case* (r), where a minor had made a lease for years by parole, it was held by Justice Gawdy, that, the lease having been made to try the title of the land, which was *a good consideration, and to the profit of the infant, and for his advancement*, the lease was not void; but Justice Southcote and Chief Justice Wray conceived, that, the lease being without rent, profit, or other recompence, it was void *ab initio* for want of a consideration; so that all the judges agreed in making the infant's benefit the criterion, though they differed in the application of it to the particular circumstances of the case.

2. How far an infant is precluded from avoiding the assurance by any subsequent act.

It is laid down by Lord Mansfield in *Zouch v. Parsons* (s), that if an infant do a *right* act, which he *ought to do*, which he is *compellable to do*, it shall bind him; as if he make equal partition, if he pay rent, if he admit a copyholder upon a surrender. And upon this principle the Court decided in that case, that a mortgagee's infant heir, who had conveyed the trust estate by the mortgagor's direction, could not subsequently avoid it. But this determination seems open to objection; for, if the Court proceeded on the ground, that the conveyance was a right and proper act on principles of equity, such a doctrine would manifestly confound the legal and equitable jurisdictions; for, independently of the trust, the avoidance had been effectual; and if, on the equity of the

(r) 2 Leon. 216; and see *Lloyde* Lit. 51. b.
v. *Gregory*, Cr. Car. 502; Co. (s) 3 Burr. 1801.

case, it was declared to be a nullity, the decree of the Court amounted to a precedent for granting equitable relief. But if the Court considered the infant as compellable to convey under the statute of 7 Ann. c. 19, this appears not exactly the truth; for the act is not imperative, but discretionary; it declares that it shall be *lawful* for the infant to convey; and the infant's assurance is to be made upon the direction of the Court of Chancery or Exchequer; so that a court of common law, in deciding the validity of the infant's conveyance, assumed to itself that discretion, which the Legislature had expressly delegated to one of the courts of equity. Lord Mansfield in conclusion observed, that, by this decision, circuitry of suit was avoided; for, if a court of law should declare the conveyance inoperative, a court of equity would not hesitate to decree a new conveyance. It was under cover of this plea, that the legal and equitable jurisdictions were in the last century almost confounded; but the tendency of the courts at the present day is to keep the jurisdictions distinct.

Another objection to an infant trustee is, that he cannot be decreed to make satisfaction on the ground of a breach of trust (*t*). However, an infant has no privilege to cheat men (*u*), and therefore he will not be protected, if he be old and cunning enough to contrive a fraud (*x*).

From the great inconveniences attending the appoint-

(*t*) See *Whitmore v. Weld*, 1 40; *Evroy v. Nicholas*, 2 Eq. Vern. 328; *Russell's case*, 5 Re. Ca. Ab. 488; *Earl of Buckingham* 27. a.; *Hindmarsh v. Southgate*, v. *Drury*, 2 Ed. 71, 72; *Clare* 3 Russ. 324. . v. *Earl of Bedford*, 13 Vin. 536,

(*u*) *Evroy v. Nicholas*, 2 Eq. Ca. *Watts v. Cresswell*, 9 Vin. 415; Ab. 489, *per* Lord King. *Beckett v. Cordley*, 1 B. C. C. 358;

(*x*) See *Cory v. Gertcken*, 2 Mad. *Savage v. Foster*, 9 Mod. 37.

ment of an infant as trustee, there arises a strong presumption, wherever property is given to an infant, that he is intended to take it beneficially (*y*).

An alien may effectually discharge the office of trustee in respect of chattels personal, but otherwise in respect of freeholds and chattels real, the policy of the law not permitting an alien to sue or be sued touching lands, in any court either of law or equity (*z*). Besides, on inquisition found, the legal estate of the property would vest by forfeiture in the king (*a*).

The number of the trustees is also a point very material to be considered, for, in nine cases out of ten, the misapplication of the trust fund has arisen from want of due attention to this particular. A single trustee, whether originally appointed such, or become so by survivorship, has the absolute and unlimited control over the property, and, should he become involved in difficulties, he is under a strong temptation to sustain his credit by resorting to a fund, of which he can with certainty possess himself, and without the fear of immediate detection. The fallacious hope of replacing the money before the day of payment arrives has lulled the conscience of many, not the worst of mankind, when suffering under the pressure of poverty. There can be no objection to the appointment of a single trustee, where, as in uses to bar dower, the trust reposed in him is merely a nominal confidence; but where the administration of the trust involves the receipt and custody

(*y*) *Lamplugh v. Lamplugh*, 1 283; and see *King v. Denison*, 2 P. W. 112; *Blinkhorne v. Feast*, 2 V. & B. 278.
 Ves. 30; *Mumma v. Mumma*, 2 (*z*) Gilb. on Uses, 43.
 Vern. 19; *Taylor v. Taylor*, 1 (*a*) *Fish v. Klein*, 2 Mer. 143.
 Atk. 386; *Smith v. King*, 16 East,

of money, the safeguard of at least two trustees ought never to be dispensed with. And, on the death of one of the original trustees, no time should be lost in restoring the fund to its proper security by the substitution of a new trustee—a precaution, it is feared, but too frequently neglected from motives of delicacy; the surviving trustee is sensitive, and conceives his honesty is called into question, and the *cestuis que trust*, often too ignorant of the world to see the necessity of taking precautions against fraud, are apt to suspect their legal adviser of a wish to create business at the expense of the estate. To guard against the constant recurrence of appointment of new trustees, it is common, at least where the property is considerable, to appoint four trustees originally; for then, on the decease of the first, or even a second trustee, an immediate substitution is not very material, for so long as the plural number remains, the necessary check is preserved. In the case of stock, it is a rule with the Bank not to allow a fund to be transferred into the names of *more* than four joint proprietors.

CHAPTER VII.

OF VESTING THE LEGAL ESTATE IN THE TRUSTEE.

IN the case of a simple trust, as the statute of Henry the 8th operates upon the first use, whether designated in the instrument as a use or trust, if a conveyance or devise be to A. and his heirs "in trust" for B. and his heirs, the possession will be executed in B. (a); and the statute must operate, notwithstanding the intention of the settlor to the contrary, for the will of the subject cannot control the express enactment of the Legislature (b). In order, therefore, to prevent the legal estate from being executed in the *cestui que trust*, it is necessary to vest in the trustee not only the ancient common law fee, but also the primary use, as, by conveying or devising "to the trustee and his heirs to the use of the trustee and his heirs (c)," or "unto and to the use of the

(a) As in *Austen v. Taylor*, 1 Ed. 361; *Robinson v. Grey*, 9 East, 1, &c. See *Broughton v. Langley*, 2 Salk. 679.

(b) See *Carwardine v. Carwardine*, 1 Ed. 36. In *Gregory v. Henderson*, 4 Taunt. 772, Judges Chambre and Gibbs laid a stress on the testator's *intent*, but Judge Heath referred the case to the

true principle, viz. that, the trustees having a duty to perform, it was a trust special, and so out of the statute.

(c) *Robinson v. Comyns*, Rep. t. Talb. 164; *Attorney-General v. Scott*, Id. 138; *Hopkins v. Hopkins*, 1 Atk. 589, *per* Lord Hardwicke.

trustee and his heirs (*d*);” for, although by this form of limitation the trustee will be *in* by the common law, yet, as the use and the possession are both vested in the trustee, the trust over, as not being the primary use, will not be affected by the statute.

But special trusts are not within the purview of the act (*e*); and therefore, if any agency be imposed on the trustee, as by a limitation to A. and his heirs, upon trust to pay the rents (*f*), or to convey the estate (*g*), or any control is to be exercised, or duty to be performed, as upon trust to apply the rents to a person’s maintenance (*h*), or in making repairs (*i*), to hold for the separate use of a feme covert (*k*), or to preserve contingent remainders (*l*), and *a fortiori* if to raise a sum of money (*m*), or to dispose of by sale (*n*), in all these cases, as the trust is of a special character, the operation of the statute of uses is effectually excluded.

But if the trustees be simply to “permit and suffer A. to receive the rents (*o*),” or the legal estate be limited to the

(*d*) *Doe v. Passingham*, 6 B. & C. 305.

(*e*) See Introduction; and see *Wright v. Pearson*, 1 Ed. 125; *Mott v. Buxton*, 7 Ves. 201.

(*f*) *Robinson v. Grey*, 9 East, 1; *Symson v. Turner*, 1 Eq. Ca. Ab. 383, note, 3rd resolution; *Garth v. Baldwin*, 2 Ves. 646; and see *Nevil v. Saunders*, 1 Vern. 415; *Jones v. Lord Say & Seal*, 1 Eq. Ca. Ab. 383.

(*g*) *Garth v. Baldwin*, 2 Ves. 646, &c.

(*h*) *Sylvester v. Wilson*, 2 T. R. 444.

(*i*) *Shapland v. Smith*, 1 B. C. C. 75.

(*k*) *Hartom v. Harton*, 7 T. R. 652; and see *Nevil v. Saunders*, 1 Vern. 415; *Jones v. Lord Say & Seal*, 1 Eq. Ca. Ab. 383.

(*l*) *Biscoe v. Perkins*, 1 V. & B. 485.

(*m*) *Wright v. Pearson*, 1 Ed. 119; *Stanley v. Lennard*, 1 Ed. 87.

(*n*) *Bagshaw v. Spencer*, 1 Ves. 142.

(*o*) *Broughton v. Langley*, 1 Eq. Ca. Ab. 383; *S. C.* 2 Salk. 679; overruling *Burchett v. Durdant*, 2 Vent. 311; *Right v. Smith*, 12

trustees *charged with debts*, and subject thereto in trust for A., but no direction to the trustees personally to pay the debts (*p*), here, as the trustees have no agency assigned to them, but merely stand seised in trust, the statute will operate, and execute the possession in A.

Where the trust was “to pay unto *or* permit and suffer a person to receive” the rents, as the former words would have created a special trust, and the latter would have been construed a use executed by the statute, the Court determined, for want of a better reason, that the former or latter words should prevail, as the instrument, in which they were found, happened to be a deed or a will (*q*).

East, 455; *Wagstaff v. Smith*, 9 Ves. 524, *per* Sir W. Grant; *Gregory v. Henderson*, 4 Taunt. 773, *per* Heath, J.; *Warter v. Hutchinson*, 5 Moor. 143; *S. C.* 1 B. & C. 721.

(*p*) *Kenrick v. Lord Beaucherk*,

3 B. & P. 175; *Jones v. Lord Say & Seal*, 8 Vin. 262. In this case the remainder was given to the trustees upon trust subject to the annuities, and was held to be executed.

(*q*) *Doe v. Biggs*, 2 Taunt. 109

CHAPTER VIII.

WHO MAY BE CESTUI QUE TRUST.

ON the principle of *æquitas sequitur legem*, those persons only, who may purchase the legal estate, may become purchasers of the equitable.

It is laid down by Chief Baron Gilbert, that the King cannot have a feoffee to his use, because he cannot take but by matter of record; but, if the use be *found by office* upon record, then he may take (a). But Lord Bacon seems to have thought, that the purpose of the inquest was not to *make*, but to *find* the title; for he says, "It behoveth both the *declaration of the use*, and the *conveyance itself*, to be matter of record, because the King's title is compounded of both. I say, not appearing of record, but by conveyance of record; and, therefore, if I covenant with J. S. to levy a fine to him to the King's use, which I do accordingly, and the deed of covenant be not inrolled, and the deed be found by office, the use vesteth not; *e converso* inrolled. If I covenant with J. S. to enfeoff him to the King's use, and the deed be inrolled, and the feoffment be found by office, the use vesteth (not); but if I levy a fine, or suffer a recovery to the King's use, and declare the use by deed of covenant inrolled, though the King be not a

(a) Gilb. on Uses, 44, 204.

party, yet the use is good enough (*b*).” If the law be thus, the abolition of fines and recoveries may have created a difficulty of declaring a trust to the King.

A corporation may be a *cestui que trust*, but not of lands without a licence from the Crown, for otherwise there would be an evasion of the Statutes of Mortmain (*c*).

A trust of real estate may be declared to an alien (*d*); but it seems he cannot compel the execution for his own benefit (*e*), it being contrary to the policy of the law, that an alien should plead or be impleaded touching lands in any court in the kingdom (*f*); and the King on inquest found shall be entitled to the trust by forfeiture, for the mischief is the same as if the alien had purchased the lands themselves (*g*); but the forfeiture vests not in the King the legal estate (*h*), but merely transfers to him the right of suing a *subpoena* against the trustee in equity (*i*).

It is sometimes a question, and not very easy to be determined, who is the actual *cestui que trust*.

In a case before Lord Keeper Bridgman it was doubted, whether a conveyance for payment of debts, made voluntarily, and no creditors named in the deed, was revocable by the grantor, and the Court, with the assist-

(*b*) Bacon's Law Readings, 349.

(*c*) See Shepp. Touch. 509.

(*d*) See *Godfrey v. Dixon*, Godb. 275; but see Br. Feff. al us. 339. a, pl. 29.

(*e*) *King v. Holland*, Al. 16, per Bacon, J.; S. C. Styl. 21, per Roll, J.

(*f*) Gilb. on Uses, 43.

(*g*) *Attorney-General v. Sands*,

Hard. 495, per Lord Hale; *Fourdrin v. Gowdey*, 3 M. & K. 383.

(*h*) *King v. Holland*, Al. 14; *Sir John Dack's case*, cited Ib. 16; *Attorney-General v. Sands*, Hard. 495, per Lord Hale.

(*i*) *King v. Holland*, Al. 16, per Roll, J.; Roll. Ab. 194, pl. 8.

ance of the judges, was clearly of opinion, that the deed was founded on a just and honest consideration, and the creditors were *cestuis que trust*, and might compel the execution (*k*). But in a case before Lord Eldon, where the creditors were scheduled to the deed, though neither parties nor privy to it, the instrument was held to be revocable (*l*); and so it was determined in a more recent case, where the creditors were parties to the deed, but not privy to it (*m*). And the principle, upon which the modern doctrine proceeds, is reasonable enough; for, "Where," observed Sir L. Shadwell, "a person without the privity of any one, without receiving consideration, and without notice to any creditor, makes a disposition, as between himself and trustees, for payment of debts, he is merely directing the mode in which his own property shall be applied for his own benefit, and the general creditors, or the creditors named in the schedule, are merely persons named there for the purpose of shewing how the trust property shall be applied (*n*)." "The deed merely operates," said Sir J. Leach, "as a power to the trustees, which is revocable by the debtor, and has the same effect, as if the debtor had delivered money to an agent to pay his creditors, and, before any payment made by the agent, or communication by him to the creditors, had recalled the money so delivered (*o*). And the present Lord Chancellor, when Master of the Rolls, ob-

(*k*) *Langton v. Tracy*, 2 Ch. Re. 30; and see *Leech v. Leech*, 1 Ch. Ca. 249.

(*l*) *Wallwyn v. Courtis*, 3 Mer. 707; *S. C.* 3 Sim. 1.

(*m*) *Garrard v. Lauderdale*, 3 Sim. 1; and see *Acton v. Wood-*

gate, 2 M. & K. 492; *Page v. Brown*, 4 Russ. 24.

(*n*) *Garrard v. Lord Lauderdale*, 3 Sim. 12.

(*o*) *Acton v. Woodgate*, 2 M. & K. 495.

served, "In *Walwyn v. Coutts* and *Garrard v. Lord Lauderdale* the character of trustee and *cestui que trust* never existed between the creditor and the trustees, for the settlor himself was the only *cestui que trust*, and therefore he was entitled to direct the application of his own trust fund. The rule is adopted to promote the views and intentions of the parties. A man, who, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself, and not to his creditors; it would be a result most remote from the contemplation of the debtor, if it should be held, that any creditor, discovering the transaction, should be able to fasten upon the property, and invest himself with the character of *cestui que trust* (p)."

The case of *Garrard v. Lord Lauderdale* involved the additional circumstance of a subsequent communication from the trustees to the creditors of the contents of the trust deed, but the Court was of opinion, as appears right upon principle, that the revocable nature of the instrument was not thereby destroyed (q).

Another instance of an ostensible, but not actual *cestui que trust*, is, where the trustees are directed to pay out of the estate the costs and charges of the management and administration of the trust; for the persons employed by the trustees have, notwithstanding that declaration, no lien upon the trust fund, but only a remedy against the trustees upon the ground of the contract (r). But if the settlor expressly desire that A. B. shall be

(p) *Bill v. Cureton*, 2 M. & K. 511. v. *Woodgate*, 2 M. & K. 495.

(r) *Worrall v. Harford*, 8 Ves.

(q) See *Garrard v. Lord Lauderdale*, 3 Sim. 12; but see *Acton*

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employed as agent at the usual fees, shewing an intention of conferring a beneficial appointment upon him, in such case A. B. is a *cestui que trust*, and cannot, during good behaviour, be dismissed from the office (*s*).

(*s*) *Lawless v. Shaw*, Lloyd & Goold, 154.

CHAPTER IX.

WHAT CONSIDERATION WILL SUPPORT THE TRUST.

OF course the trust will be executed, wherever there is a *valuable* consideration ; but, where the settlement is merely *voluntary*, it is commonly supposed, that, to attract the jurisdiction of the Court, there must be what is called a transmutation of the possession ; that is, the legal estate must be put out of the settlor, and vested in some third person, as trustee ; but perhaps, upon examination of the authorities, the validity of the trust will be found to resolve itself into the question, whether or no the trust was at first *perfectly created*.

“ If,” said Lord Eldon, “ you want the assistance of the Court to constitute you *cestui que trust*, and the instrument be voluntary, you shall not have that assistance ; as, upon a covenant to transfer stock, &c., if it *rest in covenant*, and be purely voluntary, the Court will not execute it ; but if the party have completely transferred stock, &c., though it be voluntary, yet, the legal conveyance being effectually made, the equitable interest will be enforced in this Court ;” and then, in answer to the objection, that where the legal estate had again become vested in the author of the trust, the Court would not act, his Lordship observed—“ He doubted whether that doctrine would apply, where the trust was originally *well*

created, and did not merely *rest in engagement to create it (a)*." And many years after, his Lordship expressed himself in similar terms—"The distinction," he said, "is settled, that, in the case of a *contract* merely voluntary, the Court will do nothing; but if it do not rest in voluntary agreement, but an *actual trust be created*, the Court does take jurisdiction *(b)*."

In *Ex parte Pye (c)* his Lordship was still more explicit, and made it perfectly clear, in what sense his former observations were meant to be understood. J. M. had authorized C. D. to purchase an annuity for M. G. G. for life. The annuity was purchased, but *in the name of J. M.*, who thereupon sent over a power of attorney to transfer the annuity into the name of M. G. G. Before the commission could be executed, J. M. died, but Lord Eldon determined, that a valid trust had been created. "The question," he said, "involves the point, whether the power of attorney amounts here to a declaration of trust. It is clear, that this Court will not assist a volunteer; yet, *if the act is completed*, though voluntary, the Court will act upon it. It has been decided, that, upon an *agreement* to transfer stock, this Court will not interpose, but, *if the party had declared himself to be the trustee of the stock*, it becomes the property of the *cestui que trust* without more, and the Court will act upon it. From the documents before me it does appear, that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration, that he held this part of the estate in trust for the annuitant."

(a) *Ellison v. Ellison*, 6 Ves. Ves. 99.

662.

(c) 18 Ves. 140.

(b) *Pulvertoft v. Pulvertoft*, 18

Sir W. Grant appears to have concurred in the same doctrine, for, "The Court," he said, "will not interfere *to give perfection* to the instrument; but when the trust is *created*, no consideration is essential, and the Court will execute it, though voluntary (*d*).” And again in *Antrobus v. Smith* (*e*), where a Mr. Crawford had written on the back of a receipt, "I hereby assign to my daughter all my interest in the Clyde and Forth Navigation," and, the paper not passing the legal possession, Sir S. Romilly contended, that it nevertheless amounted to a declaration of trust, Sir W. Grant apparently admitted the principle, that a declaration of trust, *intended to be such*, would have been executed by the Court; for he observed, that Mr. Crawford was no otherwise a trustee, than as any man might be called so, who professes to give property by an instrument incapable of conveying it; he was not in form declared a trustee, nor was that mode of doing what he proposed in his contemplation; he meant a gift; he said he assigned the property, but it was a gift not complete.

The decision in this case by Sir W. Grant may at first sight appear not easily reconcileable with Lord Eldon's determination in *Ex parte Pye*, but between the two cases there was this substantial distinction. In *Antrobus v. Smith* the act was not complete, and therefore the Court could not complete it; but in *Ex parte Pye* the gift was perfected as soon as the agent had laid out the money in the purchase of the annuity. Had the purchase been made in the name of J. M. as beneficial

(*d*) *Sloane v. Cadogan*, Append. to Vend. and Purch. No. 24. *teen v. Missing*, 1 Mad. 183, 185; *Bolton v. Bolton*, stated *infra*; *For-*
 (*e*) 12 Ves. 39; and see *Cot-* *tescue v. Barnett*, 3 M. & K. 36.

owner, the execution of the power of attorney, as it failed to transfer the possession, would not have been a valid declaration of trust, but the purchase was made in the name of J. M. as trustee for the annuitant, and the power of attorney and other documents were read, not as instruments originating the trust, but as proofs of the trust which had been previously created.

It is quite clear, that, if there be a transmutation of the possession in the first instance, and the property afterwards get back into the hands of the settlor, he cannot profit by that accident to appropriate the beneficial ownership (*f*); and if a person be possessed of an equitable reversionary interest (*g*), or generally of any equitable interest whatsoever (*h*), and assign it to a trustee for another, the new *cestui que trust* may compel the execution of the settlement, though, as regards the legal estate, there was no transmutation of possession, for there was all the transmutation of possession, of which the property was capable (*i*).

J. B. had executed a voluntary assignment to trustees of a policy of assurance, and had covenanted to pay the premiums. The trustees had *omitted to give notice to the office*, and afterwards J. B. surrendered the policy, with a bonus that had been declared upon it, for valuable consideration, and converted the proceeds to his own use. The surviving trustee filed a bill against J. B. to compel him to give security for the amount insured, and for the value of the bonuses declared, or which might have been declared had the policy not been surrendered.

(*f*) *Ellison v. Ellison*, 6 Ves. 656.

(*h*) *Cotteen v. Missing*, 1 Mad. 176.

(*g*) *Sloane v. Cadogan*, Append. to Vend. and Purch. No. 24.

(*i*) *Sloane v. Cadogan*, Append. to Vend. and Purch. No. 24.

Sir J. Leach, in decreeing to that effect, observed, "The gift of the policy appears to me to have been perfectly complete, for nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant, if the trustees had given notice of the assignment to the assurance office. The question turns simply upon whether any act remained to be done by the grantor, which, to assist a volunteer, this Court would not compel him to do. I am of opinion, that no act remained to be done to complete the title of the trustees. They ought to have given notice of the assignment, but their omission to give notice of the assignment cannot affect the *cestuis que trust* (k)."

But where a voluntary settlement by way of trust has been originally well created, it is liable, like a settlement of the legal estate, to be defeated by a subsequent sale to a purchaser, even with notice. And the *cestui que trust* can neither obtain an injunction against the sale, though the settlement was founded on meritorious consideration, as a provision for a wife or child (l), nor can follow the estate into the hands of the purchaser (m), nor charge him with misapplication of the purchase money, if, with notice of the voluntary settlement, he paid it to the vendor (n), nor can come upon the settlor himself to compensate the *cestuis que trust* for their loss (o). How-

(k) *Fortescue v. Barnett*, 3 M. & K. 36.

(l) *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

(m) *Williamson v. Williamson*, 1 Ves. 516, *per* Lord Hardwicke.

(n) *Evelyn v. Templar*, 2 B. C. C. 148; and see *Pulvertoft v. Pulvertoft*, 18 Ves. 91, 93; *Buckle v. Mitchell*, 18 Ves. 112; but com-

pare *Leach v. Dean* (1 Ch. Re. 146) with *Pulvertoft v. Pulvertoft*, 18 Ves. 91; and see 18 Ves. 92, note (b).

(o) *Williamson v. Codrington*, 1 Ves. 516, *per* Lord Hardwicke; but see *Leach v. Dean*, 1 Ch. Re. 146; *S. C.* cited *Pulvertoft v. Pulvertoft*, 18 Ves. 91.

ever, the trust will be executed by the Court until the estate be actually sold (*p*), and the author of the settlement, if he contract for the sale, cannot himself file a bill to enforce the specific performance (*q*).

Chattels personal (in which respect they differ from chattels real (*r*)) are not within the statute of 27 Eliz. c. 4, relating to *purchasers*, and therefore a settlement of chattels personal cannot be defeated by a subsequent sale (*s*). But the statute of 13 Eliz. c. 5, extends to every description of personalty, and, therefore, a settlement of chattels, whether real or personal, by one indebted at the time will be void as against *creditors* (*t*).

As every agreement under hand and seal carries a consideration upon the face of it, and will support an action at law, the inference has not unfrequently been drawn, that equity, at least in former times, would have specifically executed such an instrument in favour of volunteers. But the doctrine is at once contradicted by the circumstance, that equity would not have enforced a covenant to stand seised to the use of a stranger; and, if we examine the authorities, we shall find there is very little ground in support of the position. In *Wiseman v. Roper* (*u*) the covenant was entered into for the purpose of reconciling family differences—a consideration always held to be good. *Beard v. Nutthall* (*x*) was the

(*p*) *Pulvertoft v. Pulvertoft*, 18 Ves. 94.

(*q*) *Johnson v. Legard*, Turn. & Russ. 294; *Smith v. Garland*, 2 Mer. 123.

(*r*) *Saunders v. Dehew*, 2 Vern. 272, second note.

(*s*) *Jones v. Croucher*, 1 Sim. & Stu. 315; this case cites also the

authority of Sir W. Grant in *Sloane v. Cadogan*, Append. to Vend. and Purch., but the *dictum* does not appear.

(*t*) *Fletcher v. Sidley*, 2 Vern. 490; *Taylor v. Jones*, 2 Atk. 600.

(*u*) 1 Ch. Re. 158.

(*x*) 1 Vern. 427.

case of a bond from a husband to the wife, which is not an agreement to do a future act, but the perfect creation of a present debt. In *Husband v. Pollard* (y) a lease was assigned to a volunteer with a covenant to renew, and a court of equity compelled the execution of the covenant as incidental to the lease. In other cases the covenant has been enforced in order to avoid circuitry, inasmuch as the trustees, with whom the covenant was entered into, might have recovered at law, not merely nominal damages, but the full value of the estate (z). At all events, it is well settled at the present day, that a voluntary covenant will *not* be specifically executed (a).

It is said, that, where the trust is imperfectly declared, the Court will not necessarily insist upon a *valuable* consideration, but will also act upon *meritorious* consideration, as payment of debts, or provision for a wife or child.

The covenant to stand seised to uses, and the jurisdiction of the Court in supplying surrenders, and aiding the defective execution of powers, have generally been referred to as establishing, or at least countenancing, this doctrine.

As regards the covenant to stand seised to uses, it is evident that mere meritorious consideration was not a sufficient ground to attract the jurisdiction of the Court; for no use would have arisen in favour of a wife or child, unless there had been a *covenant*. "There are

(y) Cited *Randal v. Randal*, 2 P. W. 467.

(z) *Vernon v. Vernon*, 2 P. W. 594; *Goring v. Nash*, 3 Atk. 186, 2nd ground; *S. C.* cited 1 Ves. 513; *Stephens v. Trueman*, 1 Ves. 73.

(a) *Fursaker v. Robinson*, Pr. Ch. 475; *Evelyn v. Templar*, 2 B. C. C. 148; *Colman v. Sarel*, 3 B. C. C. 12; and see *Pulvertoft v. Pulvertoft*, 18 Ves. 93.

several ways in the law," said Lord Chief Justice Holt, "for declaring of uses, whether upon transmutation of possession or without it. If a use be declared upon transmutation of possession, as in a fine or feoffment, it is sufficient for the party on the transmutation to declare, that the use shall be to such a party, and of such an estate; but if a use arise without transmutation of possession, the use then does not arise by virtue of any declaration or appointment, but there must be some precedent obligation to oblige the party declaring the use, which must be founded on some consideration; for a use, having its foundation generally on grounds of equity, could not be relieved in Chancery without transmutation of possession, or an agreement founded on a consideration; and therefore, if bargain and sale were made of a man's lands, on the payment of the money the use would have arisen without deed by parol; *but, if the use was in consideration of blood, then it could not arise by parol agreement without a deed, because that agreement was not an obliging agreement—it wanted a consideration, and therefore, to make it an obliging agreement, there was necessity of a deed (b).*" Thus, if equity be governed by the strict analogy of uses, the Court cannot act upon meritorious consideration where the contract is by parol; and though, where the agreement is under seal, the argument of analogy applies, yet it follows not, that equity will now raise a trust, because formerly it would have created a use: a bargain and sale for 5s. consideration still operates by way of conveyance to transfer the estate; but, should the bargain and sale be void as such for want

(b) *Jones v. Morley*, 12 Mod. 161.

of an indenture, or an indenture duly inrolled, it could not be argued, that the agreement at the present day would be specifically executed upon the basis of a trust. Besides, if equity were governed by the analogy of uses, the covenant would form a *lien* upon the estate, and convert the settlor into a trustee; but Sir W. Grant, in a case that will be cited presently, was clearly of opinion, that the contract could not be enforced against the settlor himself (*c*); and, where a person conveyed copyholds by deed, and the grantee filed a bill against the settlor's heir, his Honour decided, that the plaintiff was not entitled to call upon the heir as a trustee to surrender, but directed an inquiry whether the heir was provided for (*d*): and of the same opinion was Lord Hardwicke in a similar case of freeholds (*e*). It may further be remarked, that, if the covenant to stand seised to uses were now to regulate the administration of trusts, there would be no ground for extending the relief to creditors, who, however, it is admitted on all hands, are equally entitled to the benefit of meritorious consideration. And the covenant to stand seised to uses extended, we must remember, not only to a wife and child, but also to *brothers, nephews, and cousins*; but who, at the present day, would think of admitting the same latitude in the execution of a trust?

With respect to the jurisdiction of the Court in supplying surrenders of copyholds, the principle upon which the relief is founded appears to be this: that, as the heir was never meant by the law to take otherwise than

(*c*) *Antrobus v. Smith*, 12 Ves. Ves. 294.

39.

(*e*) *Goring v. Nash*, 3 Atk. 186;

(*d*) *Rodgers v. Marshall*, 17 see 188, 192.

in default of the ancestor's will, if the ancestor manifest any intention in favour of a meritorious object, the Court will not suffer the mere want of form to carry a benefit to the representative. "I have looked," said Lord Alvanley, "at all the cases I can find, upon what principle this Court goes in supplying a defect. It is this:—whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligation shews an intention to execute such power, the Court will operate upon the conscience of the *heir* to make him perfect this intention. This is not to be confounded with the case of the heir's being disinherited by a will of freeholds not duly executed; there is no will at all; the Court cannot see there is such an instrument; but whenever there is such a power, it has been executed (*f*)."

The ground, upon which the Court aids the defective execution of powers, will be found upon examination to be precisely that upon which it supplies the surrenders of copyholds. The power, to the extent to which it may be exercised, is regarded in equity as part of the dominion—as a portion of the actual estate; and the donee of it is *pro tanto* the *bonâ fide* owner of the property, while the remainderman is a *quasi* heir, who takes in default of the donee's disposition (*g*). The only distinction between an actual heir and the remainderman is this, that the former is so constituted by course of law, while the latter is a *quasi* heir specially appointed by the will of the settlor. Thus, in aiding the defective execution

(*f*) *Chapman v. Gibson*, 3 B. C. C. 230; and see *Ellis v. Nimmo*, Lloyd & Goold, 341, 348.

(*g*) See *Holmes v. Coghill*, 12 Ves. 213; *Coventry v. Coventry*, at the end of Francis's Maxims of Equity.

of powers, the Court says, as in supplying surrenders, The donee of the power, who is the owner of the property to the extent of that power, has indicated an intention of providing for a meritorious object; and the remainderman, who is a kind of heir, shall not, through want of form, run away with the estate from those who are much better entitled.

With these preliminary remarks we proceed to an examination of the cases.

In *Ventris* we find a note, that, "If a man make a voluntary conveyance, and there is a defect in it, so as it cannot operate at law, the Court will not decree an execution thereof; but sometimes it has been decreed when it is intended a provision for *younger children* (*h*).¹" As the remark is addressed, not to children generally, but only to younger children, it seems allusion is merely made to the case of supplying surrenders of copyholds against an eldest son otherwise provided for.

Leech v. Leech (*i*), as stated by the reporter, was this—"A father, tenant *pur autre vie*, made a lease for *ninety-nine years*, as was pretended, but was to A. and B. and their heirs habendum for ninety-nine years, which Mr. Attorney pressed was void, and then the trust annexed to the lease was void. The Lord Keeper (Sir Orlando Bridgman), said, 'The trust is for payment of debts, and that shall support it. A trust for payment of debts generally is good against an heir, though not to be maintained against a purchaser.'²" The marginal note to the case is, that "if a trust be for payment of debts, it may support a conveyance otherwise void." But the validity of the conveyance was not called into question. The

(*h*) Note to *Bonham v. Newcomb*, 2 Vent. 365.

(*i*) 1 Ch. Ca. 249.

difficulty was, that, as the habendum for ninety-nine years was repugnant to the previous grant to the trustees *and their heirs*, the term had not been legally created, and the trustees took the freehold (*k*). The grantor, supposing he had limited a term, had declared the trust of a term; and it was argued by counsel, that, as there was no term, there could be no trust—a mere technical objection, which the Court did not hesitate to overrule.

In *Fothergill v. Fothergill* (*l*) it was held by Lord Keeper Wright, and Sir J. Trevor, M. R., that, “when-ever a conveyance was made upon a *good* consideration, if there was any defect in the execution of it, the Court had always supplied the defect, as in case of a feoffment to supply the defect of livery, in devise of a copyhold to supply the defect of a surrender, and much more in case of a power.” And it was further held, that “*payment of debts, provision for a wife and children*, marriage or purchases, were considerations for which the Court had supplied such defects, and, though provisions for wife or children after marriage were not *valuable* considerations, yet they were *good* considerations, and always helped in that Court.” And agreeably to this view was afterwards decided by Lord Keeper Wright the case of *Watts v. Bullas* (*m*). J. S. had made a voluntary conveyance to a brother of the half blood, which was void and defective at law, and afterwards died without issue, and the half-brother brought a bill against the heir to compel a conveyance. The Lord Keeper said, that, “as the consideration of blood would at common law have raised a use, and as, before the statute 27 Hen. 8, such *cestui que use* should have compelled an execution of the use in a

(*k*) See Shepp. Touch. 113.

(*m*) 1 P. W. 60.

(*l*) Freem. 256.

court of equity, so would this imperfect conveyance raise a *trust* in respect of the consideration of blood, and consequently it ought to be made good." The precise point determined in this case, that a constructive trust should be specifically executed in favour of a half brother, has always been regarded as a very extravagant decision. "The Lord Keeper's reasoning," said Lord Hardwicke, "was *too large*, owing to his being then new in the Court (9), and pursuing the maxims of law too far as to the consideration of blood to raise a use, for that would carry it to the remotest blood that could raise a use in law, which this Court does not regard (*n*)."⁽ⁿ⁾ But, subject to these strictures upon the extent to which the principle was carried, Lord Hardwicke apparently admitted the reasonableness of a modified application of the doctrine.

The decision in *Sear v. Ashwell* (*o*) would at the present day be supported on the ground of transmutation of possession, but Lord Hardwicke both rested his decree at the time upon the provision for younger children, and afterwards referred to the case as decided by him upon that principle (*p*). One Atkins, in contemplation of a second marriage, made a settlement of his real estate to trustees for 500 years in nature of a mortgage, with condition, that, if his heirs or executors should pay 300*l.* to his eldest son, and 200*l.* a piece to his younger son and daughter, then the term should cease. Atkins afterwards

(*n*) *Goring v. Nash*, 3 Atk. Sw. 411, note.

189.

(*p*) *Saltern v. Melhuish*, Amb.

(*o*) Cited *Gordon v. Gordon*, 3 251.

(9) But Sir J. Trevor, who concurred in the decision, had been M. R. for ten years.

married, and sent for the settlement and burnt it. The younger children filed a bill, after the death of Atkins, to have the benefit of the settlement, a copy whereof was produced and proved. Lord Hardwicke said, he was of opinion they were entitled to relief, for the settlement was plainly a provision for younger children, who to many purposes were considered as purchasers. It was admitted, that, if the settlement was then in being, the children would at all event be entitled, and, the settlement being for children not otherwise provided for, they as such were entitled to set up the copy.

In *Bolton v. Bolton* (q) a person who had no issue but daughters, and was seised of a remainder to his own right heirs, executed a deed in the following words—“I do hereby charge all my estate with 4000*l.* a piece for all my children, and I do hereby bind myself, my heirs &c., in the sum of 25,000*l.* to my children, their executors &c., *if all my estate at my death be not equally divided among them.*” The settlor afterwards by his will disposed of the estate in a manner at variance with the deed, and the bill was filed against the *devises* of the will to have the deed carried into effect. Lord Hardwicke held, that, “as the settlement was a provision for children, there was a kind of consideration for it, and *it ought to take place of all other voluntary settlements, and therefore of the will, but not of debts or other settlements for a valuable consideration,*” and so decreed the real estate to be divided amongst the daughters as tenants in common.

The same great authority determined the very important case of *Goring v. Nash* (r). Sir R. Fagg, seised

(q) Serjeant Hill's MSS. 77; *S. C.* 3 Sw. 414, note.

(r) 3 Atk. 186.

in fee, had one son and four daughters, and, on the marriage of his son, he articted to settle the estate to the uses of the marriage, with remainder to the use of A., one of the daughters, in tail male, with remainders over. Sir Robert died, and the legal estate of the premises descended upon the son. Before the articles could be executed the son also died, and the legal fee descended upon the daughters. A. filed a bill against her sisters to have the benefit of the settlement. His Lordship said—"It has been objected, that the plaintiff is a volunteer, and not such a person as is entitled to have the articles carried into execution, or who could prevail against a subsequent purchaser. But *the strict measure, which governs the Court in a question between persons who come to carry articles into execution and purchasers or creditors, is not the rule of this Court, as between families; for, in the latter case, the Court considers whether it would be attended with hardships or not, or whether a superior or inferior equity arises on the part of the person who comes for a specific performance; and this was the ground of Lord Cowper's decision in Finch v. The Earl of Winchelsea* (s), (where an agreement for a small and inadequate consideration was carried into execution as against the heir of the settlor, but not as against his creditors, though their judgments were *puisne* to the agreement.) I mention this, to shew that the distinction has been already taken, and that it is one consideration how far the Court will support agreements of this kind against relations in a family, and against purchasers and creditors." His Lordship then rested his decree upon three grounds, the third, and apparently the principal,

(s) 1 P. W. 277.

of which was, that the limitation to the plaintiff was *a provision by a father made in favour of a daughter*. "A provision for younger children," he said, "is always favoured here, and carried into execution; they are considered as purchasers by reason of the natural obligation of parents to provide for their children, and this Court will supply for their benefit the surrender of copyhold estates, &c. A general objection has been made of hardship as to the other three sisters, and I own I thought it a hard case, and *for this reason I sent it to the Master to state the value (of their property)*; there is clearly an estate worth about 17,000*l.* descended, and doubtful besides, on the Master's report, whether another estate may not descend, but if it should not, they are amply provided for. The Court has always decreed the provision made by a parent for a child to be as extensive as the parent intended it, where it did not introduce a hardship, or leave the other children in distress, for a father may have a good reason to prefer one child to another."

In *Darley v. Darley* (t), which was also before Lord Hardwicke, a husband had declared in his lifetime by note under his hand, that "his wife might dispose of the sum of 200*l.* in such manner as she thought proper." A bill was filed for the 200*l.* against the executor of the testator, and his Lordship, in refusing to decree the payment, observed—"I do not know of any case, where it has been held, that a mere voluntary promise of a husband to a wife has been carried into execution in this Court; for it is *nudum pactum*, and would not be carried into execution between strangers." The ground of

(t) 3 Atk. 399.

Lord Hardwicke's decision was apparently this, that, where the Court has a jurisdiction, it will exercise it in favour of creditors, a wife, or child, but where the Court has no jurisdiction, it cannot assume one from the mere circumstance of such a consideration. Thus, if a parent give a bond or promissory note to a child, the remedy, *during the lifetime of the parent*, lies only at law, and no relief can be granted upon a suit instituted in equity: the bond and the note are both legal instruments, though the latter cannot be recovered upon for want of a consideration. *After the death of the parent* the child may file a bill in equity for an account of the assets, and he will be paid the bond, because, being under seal, it is sufficient to create a legal debt (*u*), but he will not be paid the note, for he comes into equity as a creditor, and the instrument upon which he claims is *nudum pactum*, and no foundation of a debt. In aiding the defective execution of powers, making good imperfect conveyances, and specifically performing agreements, equity has a peculiar jurisdiction; and *Darley v. Darley*, explained as above, does not interfere with the doctrine, that the Court will in such cases act in favour of meritorious consideration.

In *Hale v. Lamb* (*x*) W. H. by his marriage settlement had covenanted to surrender certain copyholds to uses in favour of himself, his wife and issue, with a collateral limitation to the use of his uncle. The settlor died without issue, and the heir of the uncle brought his bill for a specific performance of the covenant; and Lord Northington said—"The position is undoubtedly true, that a court of equity will not decree a specific perform-

(*u*) *Beard v. Nuttall*, 1 Vern. 427.

(*x*) 2 Ed. 292.

ance of a voluntary covenant, which is in equity no covenant at all, and only a nominal one at law. But it was insisted for the plaintiff, that a covenant to settle on the blood would raise a use to give a *subpœna*, and to call upon this Court to aid in the execution of the estate, and *this they established by cases at law, and authorities in this Court.* In *Watts v. Bullas*, it was said, that, ‘because the consideration of blood would at common law raise a use, so would an imperfect conveyance be sufficient to raise a trust,’ *which is good sense.* A settlement made on marriage, with extension to collaterals, if defective in law, should be made good in equity for the same collaterals, for the consideration of marriage and settling the estate runs through all the limitations, and the authorities confirm the reason. Nor do I see any sound objection to this, for *a man’s serious disposition by (any irridication of) his will supersedes the heir at law without injustice;* and these cases have nothing to do with the statutes against fraudulent conveyances. I think, therefore, the uncle would have been entitled to a specific execution of the covenant, *because it was consistent with the will and intent of W. H. the settlor.*” A prior tenant in tail, as the case happened, had, in his Lordship’s opinion, barred the remainder to the uncle by an equitable recovery, and therefore, on that ground, the plaintiff’s bill was dismissed.

Evelyn v. Templar (y) was heard before Lord Thurlow, and was as follows:—Charles Evelyn had settled an estate after marriage upon himself, his wife, and his children, and it was provided by the settlement, that it

(y) 2 B. C. C. 148. The decree in Reg. Lib. A. 1787, fol. 512, contains no statement of the case, but is comprised in a few lines. The bill was dismissed *with costs.*

should be lawful for Charles Evelyn, by deed executed in the presence of three witnesses, to revoke the uses and sell the estate; and he covenanted that the proceeds of the sale should be paid to the trustees, to be by them laid out, at the request of the parties interested, in a purchase of lands to be settled to the same uses. Charles Evelyn sold the estate, and the purchaser, with notice of the covenant, paid his money to the husband, who died insolvent. The widow and children filed a bill against the purchaser, on the ground that, having notice of the covenant, he had misapplied the purchase money. Lord Thurlow said—"Although it would have been as well at first, if the voluntary covenant had not been thought so little of, yet the rule was such, and so many estates stood upon it, that it could not be shaken;" and dismissed the bill with costs. The *prima facie* inference from this decision is, that Lord Thurlow considered a voluntary covenant, though in favour of a wife or children, as an absolute nullity; but his Lordship's decree may also be referred to another ground, that, where a voluntary settlement is defeated by a subsequent *bona fide* sale, the Court cannot prevent the operation of the statute of Elizabeth (z) by attaching an equity to the purchase money. A person had settled an estate with a power of sale. He afterwards disposed of the property to a stranger, not under the power, but in avoidance of the settlement by force of the statute, and, when the settlement was become a nullity, the proviso for sale, which was merely incidental and subordinate to the settlement, could not be sustained by itself. It may also be observed, that the bill had been filed against a purchaser,

(z) 27 Eliz. c. 4.

and the opinion of Lord Hardwicke, as before noticed, was, that, as against purchasers and creditors, the equity grounded on meritorious consideration could not be enforced.

In *Colman v. Sarrel* (a) 1000*l.* stock had been assigned to trustees, in trust for one who in legal construction was a stranger and mere volunteer. The settlor also covenanted, that, in case he survived the *cestui que trust*, he would pay the dividends as the *cestui que trust* should appoint the principal. No transfer of the stock was made, and, after the settlor's death, a bill was filed by the claimants under the *cestui que trust* to have the deed carried into effect. Lord Thurlow said—
“Where a deed is not sufficient in truth to pass the estate out of the hands of the conveyer, but the party must come into equity, *the Court has never yet executed a voluntary agreement*. To do so, would be to make him who does not sufficiently convey, and his executors after his death, trustees for the person to whom he has so defectively conveyed, and *there is no case where a court of equity has done that*. Whenever you come into equity to raise an interest by way of trust, you must have a *valuable*, or *at least a meritorious* consideration, (such as payment of debts, or making a provision for a wife or child (b);) nothing *less* will do (c).” These observations have generally been construed to mean, that, in Lord Thurlow's opinion, a voluntary covenant in favour of creditors, a wife, or child, should be carried into execution; but surely the fair interpretation of the passage amounts simply to this, “I am not aware that a

(a) 1 Ves. jun. 50; S. C. 3 B. C. C. 12.

(b) 3 B. C. C. 14.

(c) 1 Ves. jun. 54.

Court of equity has in *any* instance enforced a voluntary agreement; at all events no one will contend that any thing short of meritorious consideration will induce the Court to act, and here the plaintiff has not even that ground of equity." Between the two cases of *Evelyn v. Templar*, and *Colman v. Sarrel*, it is difficult to discover what the sentiments of Lord Thurlow upon this subject really were.

Lastly, we come to the case of *Antrobus v. Smith* (d) before Sir W. Grant. Gibbs Crawford had written on the back of a receipt, "I hereby assign to my daughter Anna Crawford all my shares in the Clyde and Forth Navigation." The father died, and the claimants under the daughter filed a bill against the father's representative to compel a transfer of the shares. It was proved in the cause that the settlor had afterwards changed his intention. Sir S. Romilly argued, that a provision by a father for his child was not considered a voluntary provision; but Sir W. Grant asked, "Did he recollect any instance in which the party (that is, the settlor himself,) had been compelled to perfect the gift even in favour of a child?" And Sir S. Romilly admitting he was unable to furnish a case, Sir W. Grant proceeded—"Could the settlor himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which in the mode of making it he has left imperfect. There is locus penitentiae as long as it is incomplete, and Mr. Crawford did repent. Where the gift is not testamentary, but is to operate *inter vivos*, except in the instance of a defective execution of a power, have execu-

(d) 12 Ves. 39.

tors ever been called upon to do any act to perfect it? The ordinary case is that of supplying the surrender of a copyhold. There the Court says, the *representative* shall not contest the will of the testator in those particularly favoured and excepted cases; his will was, that the estate should pass; he omitted the formality that would make it pass legally, but it shall not fail in favour of those who represent him. But this is not legatory, and therefore I cannot consider this as having the operation that a will would have. *I do not see upon principle how the Court could have acted against Mr. Crawford himself, nor, considering his declared change of intention, how it can act against the representative, upon the notion of compelling them to comply with his will. It was not his will.* No case being cited in which this was ever done, I do not see how I can make the precedent. Unless an instance can be produced, the bill must be dismissed." Thus, the principle of Sir W. Grant's decision was, that, as the Court could not have executed the agreement against the settlor himself, it could not, at least where the settlor in his lifetime had shewn any change of intention, enforce it against the representative. In the subsequent case of *Rodgers v. Marshall* (e) his Honor seems to have acceded to the doctrine, that, where the settlor has shewn no change of intention, an equitable claim, supported by meritorious consideration, may be established as against the representative. A father had settled copyholds upon his younger son by deed without surrender, and, after his father's death, the son brought his bill against the heir to have the surrender supplied. Sir W. Grant said—"There certainly are

(e) 17 Ves. 294.

cases of supplying surrenders upon a *deed* as well as a *will*, but upon the same principle, as in the case of a will or in the execution of a power, that is, for and against the same persons." In other words, that the Court would indeed supply surrenders upon instruments *inter vivos*, as well as upon wills, not however as against the settlor himself from the time of the execution, but only as against an heir who was otherwise sufficiently provided for.

Lord Eldon has, on more than one occasion, alluded to the point under discussion, but has cautiously abstained from expressing the inclination of his opinion (*f*).

The best results that can be obtained from such conflicting authorities appear to be these:—

1. There is nothing to warrant the position, that an agreement, founded on meritorious consideration, will be executed as against the settlor himself (*g*).

Indeed, relief in such a case would offend against the security of property; for, if a man will improvidently bind himself by a *complete* alienation, the Court will not unloose the fetters he hath put upon himself, but he must lie down under his own folly (*h*); but if the Court interpose where the act is left *incomplete*, what is this but to wrest property from a person who has not legally parted with it? Another observation that suggests itself is, that, during the lifetime of the settlor, the ground of meritorious consideration scarcely seems to apply; for can it be thought to be the duty of a husband to endow his wife, during the coverture, with a separate and inde-

(*f*) *Ellison v. Ellison*, 6 Ves. Ves. 39.
 662; *Pulvertoft v. Pulvertoft*, 18 (*h*) *Villers v. Beaumont*, 1 Vern.
 Ves. 98. 101, *per cur.*
 (*g*) *Antrobus v. Smith*, 12

pendent provision? or is a parent bound by any natural or moral obligation to impoverish himself (for such a case may be supposed) for the purpose of enriching a child? or has a Court of equity the jurisdiction to appropriate a specific fund to creditors, when, the debtor still living, the presumption of law is, that the creditor can obtain satisfaction of his debt by the usual legal process? It is after the decease of the settlor that meritorious consideration becomes such a powerful plea in a Court of equity. The wife and the children have then lost the personal support of the husband and parent, and who can then have a juster claim to the inheritance of his property? The creditor is then barred by the act of God of his remedy against the debtor; and, should the assets prove insufficient, how but by the assistance of equity can he hope to be satisfied his demand? Another objection to the execution of a voluntary contract against the settlor himself is the principle expressed by Lord Cowper, that Equity, like Nature, will do nothing in vain (†). Where money is directed to be converted into land, or land into money, the devisee or legatee, if no other person be interested, may elect to take the property in its original state, for, should the Court direct an actual conversion, the devisee or legatee might immediately annul the order by resorting to a re-conversion; and so, should the Court decree the specific performance of a contract for meritorious consideration, the property the next moment might be disposed of to a *bonâ fide* purchaser, and the settlement become perfectly nugatory. In a case before Lord Nottingham, Sir Henry on his marriage with Catherine had covenanted to surrender copyholds to

(†) *Seeley v. Jago*, 1 P. W. 389.

the use of himself for life, remainder to Catherine for life, remainder to the heirs male of his body by Catherine, remainder to Allen and the heirs male of his body; and Lord Nottingham said—"If Sir Henry and Allen were *both in life*, Allen could not enforce Sir Henry to execute the covenant, (yet Catherine might,) for it were vain to decree that to be done by Henry, which Henry might undo the next day (*k*)."¹ It does not appear whether Lord Nottingham meant; that, as the remainder to Allen was voluntary, Sir Henry might destroy it by a subsequent sale to a *bond fide* purchaser; or that, as Sir Henry was prior tenant in tail, he could bar the remainder over by suffering a recovery, but *utrâque viâ datâ* the principle was the same. Lord Eldon once observed—"Suppose this settlement had given an express power of revocation to the husband, having in his own dominion the means of putting an end to it the moment it was acted upon; perhaps in such a case, as in case of a *quasi* estate tail of renewable leaseholds for lives, the Court would not interfere; but here there is no power of revocation by his own act—there must be the concurrence of others. Suppose the trustees (of the settlement) were incapable of acting; that the surviving trustee had left an infant heir; it is difficult to maintain that, *though an estate and trust were actually created*, this Court would stop, on the ground that the estate might at some future period be destroyed by a conveyance for valuable consideration (*l*)."² But these observations were made upon a case in which a perfect trust had been created; and the only question the Court contemplated was, whether,

(*k*) *Bellingham v. Lowther*, 1 Ch. Ca. 243.

(*l*) *Pulvertoft v. Pulvertoft*, 18 Ves. 99.

during the continuance of the settlement, the Court should refuse to administer it. Again, if the imperfect gift can be enforced against the settlor himself, then the equitable right must form a *lien* upon the estate, and, upon the death of the settlor, his heir would, at all events, be bound to convey; but, even in aiding the defective execution of powers and supplying surrenders of copyholds, a previous inquiry by the Master is invariably directed, whether the heir of the settlor has any other adequate provision.

2. It appears, notwithstanding some show of authority against the interference of the Court in *any* case (*m*), that, *as between parties claiming under the settlor*, if the Court can act in favour of meritorious consideration without inflicting a hardship on persons peculiarly entitled to protection, the voluntary agreement will in such a case be specifically executed. The contract does not form such an absolute *lien* as to bind the settlor himself (*n*), or, if he sell the estate or become indebted, to bind a purchaser or creditors (*o*); but if he subsequently make a voluntary settlement, or die without disposing of the estate by act *inter vivos*, the equity, it seems, will be enforced against the grantees under the settlement (*p*), a devisee (*q*), or heir at law (*r*). But even as against these classes of persons, if they, too, can plead meritorious consideration, as if they are the children of the settlor, relief

(*m*) *Evelyn v. Templar*, 2 B. C. 186; *Finch v. Earl of Winchelsea*, 1 P. W. 277.
C. 148; *Antrobus v. Smith*, 12 Ves. 39.

(*p*) *Bolton v. Bolton*, *ubi supra*.

(*n*) *Antrobus v. Smith*, *ubi supra*. (q) *Ib.*

(*o*) *Bolton v. Bolton*, 3 Serjt. (r) *Watts v. Bullas*, 1 P. W. 60;
Hill's MSS. 77: S. C. 3 Sw. 414, *Goring v. Nash*, *ubi supra*; *Rodgers v. Marshall*, *ubi supra*.
note; *Goring v. Nash*, 3 Atk.

will not be extended without a previous inquiry by the Master, whether they have any adequate provision independently of the estate (*s*). Sir W. Grant seems to have thought, that, supposing the settlor to have changed his intention as to the voluntary contract, the Court had no jurisdiction to interfere (*t*). It is evident that this notion cannot be reconciled with the doctrines of Lord Hardwicke, for relief could then be granted as against the heir at law only, and not as against volunteers or devisees: the fact of the subsequent voluntary settlement or will would in itself be evidence of the settlor's having changed his intention.

The case of *Ellis v. Nimmo* (*u*) has recently been decided by Lord Chancellor Sugden in Ireland; and it was there held, that an agreement under hand only by a father in favour of his child would be specifically enforced even against the parent himself. The decree was afterwards affirmed by Lord Plunkett, but upon a different ground. Notwithstanding the high authority of Sir E. Sugden upon a question of equity, it is submitted, the subject discussed in the foregoing pages cannot be considered as finally disposed of by this decision, particularly as the very important case of *Antrobus v. Smith* before Sir W. Grant (not to mention that of *Evelyn v. Templar* before Lord Thurlow) was not once alluded to in *Ellis v. Nimmo* either by the counsel or the court.

(*s*) *Goring v. Nash*, *ubi supra*; *supra*; and see *Hale v. Lambe*, *Rodgers v. Marshall*, *ubi supra*. 2 Ed. 292.

(*t*) *Antrobus v. Smith*, *ubi* (u) Lloyd & Goold, 333.

CHAPTER X.

OF THE OBJECT PROPOSED BY THE TRUST.



THE *prima facie* rule of trusts is, that the intention of the settlor shall be carried into effect (*a*).

But the intention cannot be pursued where it contravenes the public policy of the law (*b*); as, if the trust of a chattel be limited to A. and *his heirs*, it will nevertheless be personal estate, and vest in the executors (*c*); so the trust of a chattel cannot be entailed, as, if it be limited to A. and the heirs of his body, with remainder to B., the absolute interest vests in A., and the remainder to B. is a nullity (*d*). But trusts of terms attendant upon the inheritance must be excepted from the rule; for these, partly to protect the estate from secret incumbrances, and partly to keep the property in the right

(*a*) *Attorney-General v. Sands*, Hard. 494, *per* Lord Hale; *Pawlett v. Attorney-General*, Id. 469, *per eundem*; Bacon on Uses, 79; *Burgess v. Wheate*, 1 Ed. 195, *per* Sir T. Clarke.

(*b*) See *Attorney-General v. Pearson*, 3 Mer. 399; *Hamilton v. Mainwaring*, 2 Bligh, 209; *Earl of Kingston v. Lady Pierrepont*, 1

Vern. 5.

(*c*) *Duke of Norfolk's case*, 3 Ch. Ca. 9, 11; *S. C.* 1 Vern. 164, *per* Lord Guildford; *Hunt v. Baker*, 2 Freem. 62; *Attorney-General v. Sands*, Nels. 133.

(*d*) *Duke of Norfolk's case*, 3 Ch. Ca. 9, 11; *Hunt v. Baker*, 2 Freem. 62.

channel (*e*), are made to follow, as shadows, the devolution of the freehold (*f*).

A perpetuity will no more be tolerated when it is covered with a trust, than when it displays itself undisguised in a settlement of the legal estate (*g*). "A perpetuity," said Lord Guildford, "is a thing odious in law, and destructive to the commonwealth. It would put a stop to commerce, and prevent the circulation of the riches of the kingdom, and therefore is not to be countenanced in equity. If in equity you could come nearer to a perpetuity, than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of the Court, but would be destructive to the commonwealth (*h*)."

So trusts cannot be created with a proviso, that the interest of the *cestui que trust* shall not be aliened (*i*), or shall not be made subject to the claims of creditors (*k*). If it can only be ascertained that the *cestui que trust* was intended to take a vested interest, the *mode* in which, or the *time* when, the *cestui que trust* was to reap the benefit, is perfectly immaterial—the entire interest may either be disposed of by the act of the *cestui que trust*, or may become vested in his assignees by operation of law on his bank-

(*e*) See *Willoughby v. Willoughby*, 1 T. R. 765.

(*f*) For the law upon this subject, see *Vend. & Purch. Ch. 9, Sect. 2.*

(*g*) See *Duke of Norfolk's case*, 3 Ch. Ca. 20, 28, 35, 48.

(*h*) *S. C.* 1 Vern. 164.

(*i*) *Snowdon v. Dales*, 6 Sim. 524; *Green v. Spicer*, 1 R. & M. 395; *Graves v. Dolphin*, 1 Sim. 66; *Brandon v. Robinson*, 18 Ves. 429.

(*k*) *Graves v. Dolphin*, *Snowdon v. Dales*, *Brandon v. Robinson*, *ubi supra*.

ruptcy or insolvency. Thus, if the trust be to pay the interest of a fund to a person for life "at such times and in such manner as the trustees shall think proper (l)," or "from time to time as and when it shall become due and payable (m)," or "in such smaller or larger portions, at such times immediate or remote, and in such way and manner as the trustees shall think best (n)," the discretion of the trustees is determined by the bankruptcy or insolvency of the *cestui que trust*, and the entirety of the life estate becomes vested in the assignees. Even where the trustees were directed to pay the interest of a sum "to A. for life, or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise, and so that A. should not have any right, title, claim, or demand other than the trustees should think proper;" and after A.'s decease, the principal and "all *savings or accumulations* of interest, if any," were given to the children, the Court thought, that, taking the whole instrument together, the trustees had no power to withhold and accumulate any portion of the interest during the life of A., and therefore, on his bankruptcy, the assignees became absolutely entitled (o). The question to be asked in these cases is, On the decease of the *cestui que trust* would his executor have a right to call upon the trustees to account for the arrears? If he would, then the assignees are prospectively entitled to the payments *in futuro*. But though a person cannot put a restraint upon alienation, or exclude the rights of creditors, he may settle property upon A. *until* alienation, bankruptcy, or insolvency, with a limita-

(l) *Green v. Spicer, ubi supra.* K. 4.

(m) *Graves v. Dolphin, ubi supra.*

(o) *Snowdon v. Dales, ubi supra.*

(n) *Piercy v. Roberts, 1 M. &*

tion over to B. on the happening of either of those events; or he may give the fund to A. for life or absolutely in the first instance, with a *proviso* that on alienation, bankruptcy, or insolvency, the estate shall shift over to B (*p*). But a clause divesting the property on "alienation" will extend only to a disposition by the act of the party, and not to a transfer by operation of law as bankruptcy (*q*), unless it can be collected from the context that the term was intended by the settlor to have so wide a signification (*r*); but insolvency is not a process *in invitum*, but the act of the insolvent himself, and therefore comes within the meaning of a restraint against "alienation (*s*).” However, a person cannot settle *his own* property on *himself*, with a limitation over in the event of bankruptcy or insolvency (*t*), though, on his marriage, if he receive a portion with his wife, he may settle a fund of his own to the extent of the wife's fortune, for, though apparently a settlement by the husband, it is in fact a settlement of the money advanced by the wife (*u*).

(*p*) *Shee v. Hale*, 13 Ves. 404; *Cooper v. Wyatt*, 5 Mad. 482; *Yarnold v. Moorhouse*, 1 R. & M. 364; *Lockyer v. Savage*, 2 Stra. 947; *Stephens v. James*, 4 Sim. 499; *Ex parte Hinton*, 14 Ves. 598; *Lewes v. Lewes*, 6 Sim. 304; *Ex parte Oxley*, 1 B. & B. 257; *Stanton v. Hall*, 2 R. & M. 175.

(*q*) *Lear v. Leggett*, 2 Sim. 479; *S. C.* 1 R. & M. 690; *Wilkinson v. Wilkinson*, Coop. 259; and see *S. C.* 3 Sw. 528.

(*r*) *Dommett v. Bedford*, 6 T. R. 684; *Cooper v. Wyatt*, 5 Mad. 482.

(*s*) *Shee v. Hale*, 13 Ves. 404.

(*t*) *Higinbotham v. Holme*, 19 Ves. 88; *Ex parte Hill*, 1 Cooke's Bank. Law, 291; *Ex parte Bennet*, Ib. 293; *In re Murphy*, 1 Sch. & Lef. 44; *In re Meaghan*, Ib. 179; *Ex parte Hodgson*, 19 Ves. 206.

(*u*) *Ex parte Cooke*, 8 Ves. 353; *Higginson v. Kelly*, 1 B. & B. 252; *Ex parte Verner*, Ib. 260; *In re Meaghan*, 1 Sch. & Lef. 179; *Ex parte Hodgson*, 19 Ves. 206; but see *Ex parte Hill*, 1 Cooke's Bank. Law, 291, and compare *Ex parte Hodgson*, 19 Ves. 208.

It is not unusual to find a clause in a will directory to trustees to purchase a presentation in favour of some particular object; but, it seems, if the purchase be made with the intention of presenting the *cestui que trust*, though the patron himself was ignorant of the purpose in view (*x*), it falls within the statutes enacted for the prevention of simony (*y*). A patron is forbidden to present for money, either *directly* or *indirectly*; and, the object being determined upon at the time of the purchase, the construction put upon the transaction by the Court is, that the patron presents *indirectly* by selling to a person who purchases with the sole intention of presenting.

If the object of the trust do not contravene the *policy* of the law, the mere circumstance, that the same end cannot be effectuated by moulding the legal estate, is no argument that it cannot be accomplished through the medium of the equitable. The common law has interwoven with it many technical rules, the reason of which does not appear, or at the present day does not apply; but a trust is a thing *sui generis*, and, where public policy is not disturbed, will be executed by the Court agreeably to the settlor's intention.

Thus in legal estates a fee cannot, except by executory devise, be limited upon a fee; but this modification of property was allowable in uses, and by the statute of Henry 8 has gained admittance into legal estates, and is now matter of daily occurrence in settlements by way of trust (*z*).

(*x*) *King v. Trussel*, 1 Sid. 329. Lord Hobart; Godbolt, 390; and

(*y*) *Kitchin v. Calvert*, Lane, see Fearne's P. W. 404.

102, per Baron Snig; *Whinchcombe v. Pullerton*, Noy, 25, per

(*z*) *Duke of Norfolk's case*, 3 Ch. Ca. 35.

Again, at common law a chattel real can by *will* only, and not by *dead*, and a chattel personal can neither by *will* nor *dead*, be limited to one person for life, with remainder to another ; but in trusts a chattel interest, whether real or personal, can be subjected to any number of limitations, provided there be no perpetuity, "It is objected," said Lord Nottingham, "that a lease for years, which is a chattel, will not bear a contingent limitation in regard of the poverty and meanness of the estate. Now, as to this point, the difference between a chattel and an inheritance, is a difference only in words, but not in substance or reason, or in the nature of the thing ; for the owner of a lease has as absolute a power over his lease, as he that hath an inheritance hath over that, and therefore, when no perpetuity is introduced, nor any inconveniency doth appear, there no rule of law is broken. It hath happened sometimes, and doth frequently, that men have no estates at all, but what consist in leases for years ; now it were not only very severe, but, under favour, very absurd to say, that he who has no other estate, but what consists in leases for years, shall be incapable to provide for the contingencies of his own family (a)."

A testator had devised to one that served the cure of a church, and to all that should serve the cure after him, all the tithes, profits, &c. ; but, as the successive curates were not a body corporate, they were incapable of taking the legal estate : however, equity carried the intention into effect, and decreed the devisee and his heirs to be trustees for the persons intended to be benefited (b).

(a) See *Duke of Norfolk's case*, 3 Ch. Ca. 32. (b) *Anon. case*, 2 Vent. 349.

The limitation of an estate to the poor of a parish would *at law* be void (c), because the rules of pleading require the claimants to bring themselves under the gift, and no indefinite multitude, without public allowance, can take by a general name; but by way of trust they are capable of purchasing, for they assert no title in themselves, but call upon the trustees to observe the dictates of good conscience (d). But *who* shall answer the description of “poor of a parish” appears to be matter of considerable doubt. Sir J. Leach (e) and Lord Lyndhurst (f) determined, that the objects of such a trust were the *poor who did not receive parish relief*; for otherwise, it was said, the rich, by the diminution of the rates, would participate in the charity: but Lord Eldon thought, that the fund should be administered without reference to parochial relief, for assistance might be given to a pauper without exonerating the rich from their usual contribution to the rates—to the relief, which the law had provided, further relief might be added, which the parish was not bound to afford (g). Besides, the appropriation of the fund to the poor not in receipt of parochial relief might still have the effect of conferring a benefit on the rich; for persons who could not otherwise have maintained themselves might, by means of the charity, be prevented from seeking assistance from the rate (h).

So an advowson may be vested in trustees, upon trust for the “parishioners and inhabitants,” that is, the parishioners, being inhabitants (i), of a parish. A

(c) Co. Lit. 3. a.

(g) S. C. 2 Russ. 51—54.

(d) Gilb. on Uses, 44.

(h) See S. C. 3 Russ. 397.

(e) *Attorney-General v. The Corporation of Exeter*, 2 Russ. 47.

(f) S. C. 3 Russ 395.

(i) *Fearon v. Webb*, 14 Ves. 24, per Chief Baron M'Donald; Ib. 26, per Baron Graham.

trust of this kind is not considered a charity, but is administered on the footing of any ordinary trust, and application must be made to the Court not by way of information, but by bill (*k*). From the infinite mischiefs arising from popular election, the Court, where the settlement does not expressly give the election to the parishioners, or usage has not put such a construction upon the instrument, will infer the donor's intention to have been, that the trustees should themselves exercise their discretion in the election of a clerk for the benefit of the parish (*l*); but if the language of the instrument, or the evidence of common usage, prevent such a construction, then the parishioners, as the *cestuis que trust* and beneficial owners of the advowson, will be entitled to elect, and the trustees will be bound to present the person upon whom the choice of the electors shall fall (*m*). Had the point been unprejudiced by decision, Lord Eldon doubted whether the Court could execute such a trust, at least otherwise than *cy pres* (*n*); but, as authority has now clearly settled, that the Court must undertake the trust notwithstanding the difficulties attending it, the only subject for inquiry is, *in what mode* a trust of this kind shall be executed. The expression "parishioners and inhabitants" is in itself extremely vague, and has never acquired any very exact and de-

(*k*) *Attorney-General v. Forster*, 10 Ves. 344; *Attorney-General v. Newcombe*, 14 Ves. 1; *Fearon v. Webb*, *ib.* 19.

(*l*) See *Edenborough v. Archbishop of Canterbury*, 2 Russ. 106, 109; *Attorney-General v. Scott*, 1 Ves. 413; *Attorney-General v. Foley*, cited *Id.* 418.

(*m*) *Attorney-General v. Parker*, 3 Atk. 577, *per* Lord Hardwicke; *Attorney-General v. Forster*, 10 Ves. 338, 341, *per* Lord Eldon; *Attorney-General v. Newcombe*, 14 Ves. 6, 7, *per eundem*.

(*n*) *Attorney-General v. Forster*, 10 Ves. 340, 342.

finite meaning (*o*); but, this doubt removed, another question to be asked is, are women, children, and servants, who are parishioners and inhabitants, to be allowed to vote? It seems the extent of the terms must be taken *secundum subjectam materiam*, with reference to the nature of the privilege the *cestuis que trust* are to exercise (*p*), and, if so, none should be admitted to vote, who, from poverty, infancy, or coverture, are presumed not to have a mind of their own (*q*). In a case, where the election was given to "the inhabitants and parishioners, or the major part of the *chiefest and discreetest* of them," it was held that, by *chiefest*, was to be understood those who paid the church and poor rates, and by *discreetest*, those who had attained the age of twenty-one (*r*); but Lord Hardwicke said, that, even where "parishioners and inhabitants" stood *without any restriction at all* it was a reasonable limitation to confine the meaning to those who paid scot and lot, that is, who paid to church and poor (*s*); and so, in a previous case, it seems his Lordship had actually determined (*t*). The Court of Exchequer adopted a similar construction in the *Clerkenwell case* (*u*), though it does not appear how far the Court was guided in its judgment by the evidence of the common usage (*x*); and Lord Eldon, in a subsequent

(*o*) See *Attorney-General v. Parker*, 3 Atk. 577; *Attorney-General v. Forster*, 10 Ves. 339, 342.

(*p*) See *Attorney-General v. Forster*, 10 Ves. 339.

(*q*) See *Fearon v. Webb*, 14 Ves. 27.

(*r*) *Fearon v. Webb*, 14 Ves. 13.

(*s*) *Attorney-General v. Parker*, 3 Atk. 577; *S. C.* 1 Ves. 43.

(*t*) *Attorney-General v. Davy*, cited *Ib.*; *S. C.* 2 Atk. 213.

(*u*) *Attorney-General v. Rutter*, stated 2 Russ. 101, note.

(*x*) See *Attorney-General v. Forster*, 10 Ves. 345.

case, restricted the election to the same class (*y*), but his Lordship's decree was possibly founded on the circumstance, that those only who paid scot and lot were admitted to the *vestry* (*z*); not that, for the purposes of election, the vestry is the representative of the parish (*a*), but in one of the oldest documents the trust was said to be for "the parishioners of the said parish *at a vestry or vestries to be from time to time holden for the said parish* (*b*)."
 But, where the instrument creating the trust contains merely the words "parishioners and inhabitants," the Court will not confine the privilege of voting to those paying scot and lot, if it appears from constant usage that the terms are to be taken in a wider and more extensive signification; to include, for instance, all *house-keepers*, whether paying to the church and poor or not (*c*). By persons *paying* to the church and poor must be understood persons *liable to pay*, though they may not have actually paid (*d*); but it seems to be a necessary qualification that they should have been *rated* (*e*), unless perhaps the name has been omitted by mistake (*f*), or there is the taint of fraud (*g*). With respect to the *mode* in which the votes are to be taken, it is clear that the election cannot be conducted by ballot, not only on the general principle that the ballot is a form of proceeding unknown

(*y*) *Edenborough v. Archbishop of Canterbury*, 2 Russ. 93.

(*z*) See *Ib.* 110.

(*a*) *Attorney-General v. Parker*, 3 Atk. 578, *per* Lord Hardwicke; *Attorney-General v. Forster*, 10 Ves. 340, 344, *per* Lord Eldon.

(*b*) See *Edenborough v. Archbishop of Canterbury*, 2 Russ. 94.

(*c*) *Attorney-General v. Parker*, 3 Atk. 576; *S. C.* 1 Ves. 43.

(*d*) See *Attorney-General v. Forster*, 10 Ves. 339, 346.

(*e*) *Edenborough v. Archbishop of Canterbury*, 2 Russ. 110.

(*f*) *Ib.*

(*g*) *S. C.* *Ib.* 111.

to the common law of England (*h*), but also on the ground, that the trustees have a right to be satisfied, that the person they present to the bishop has been the successful competitor; whereas in election by ballot there are no means of ascertaining for whom each particular elector voted (*i*). The choice of the candidate must therefore be determined by one of the modes known to the common law, viz. either by poll or a shew of hands (*k*). However, the *cestuis que trust* may expressly agree among themselves that they will abide by the declaration of the result of the ballot, and will ask no questions how the individual votes were given, or such a contract may be *inferred* from long and clear antecedent usage (*l*); but an agreement of this kind can apply only to each particular election as it occurs, for any one parishioner has a right to insist that the coming election shall be conducted on a different principle: it would be a bold thing to say, that the parish of to-day could bind the parish of to-morrow to deviate from the original and legitimate mode (*m*). A contract between the *cestuis que trust* in favour of the ballot is also open to the objection, that the right of voting in the election of a clerk is a privilege coupled with a *public duty*, and it may be doubtful whether a court of equity would enforce the result of an election, where it cannot be ascertained whether the voters, in the exercise of their right, have fairly and honestly discharged that duty (*n*).

Another case, in which a modification of property un-

(*h*) *Faulkner v. Elger*, 4 Barn. & Cress. 449.

(*i*) *Edenborough v. Archbishop of Canterbury*, 2 Russ. 105, 108, 109, *per* Lord Eldon.

(*k*) See *Ib.* 106, 110.

(*l*) See *Ib.* 105, 106, 108, 109.

(*m*) See *Ib.* 106.

(*n*) See *Ib.* 109.

known to the common law has been admitted into trusts, is, where property, real or personal, is settled to the separate use of a *feme covert*, so as to exclude the control of her husband. The principle at common law is, that, as the husband undertakes the debts and liabilities of the wife, he is entitled, absolutely or partially according to the circumstances of the case, to the enjoyment of her property; but in equity a *feme* is allowed to contract with the husband before marriage for the exclusive enjoyment of any specific property (o), or a person may make a gift to the wife during the coverture, and shut out the husband's interference by clearly expressing such an intention. Where the separate estate is the result of a special agreement between the parties, the policy of the law can scarcely be said to be transgressed, for the old rule was established for the benefit and protection of the husband, and *quisque remuntiare potest juri pro se instituto*; but that equity should have allowed a stranger to vest property in the wife independently of the husband during the coverture appears a more questionable doctrine, though it may be said even in this case there is no violation of the marital rights, for the property never vested in the *feme* herself, and the donor may limit any estate which the law does not refuse to recognize. The Court has also permitted the further anomaly of a restriction upon the *feme's* anticipation (where such an intention has been expressed) of the growing proceeds of the separate estate; but this indulgence appears not a distinct inroad upon the common law incidents of property, but rather an appendage to the separate use for the purpose of more effectually excluding the influence of the husband. If the wife were not debarred from anticipating the pro-

(o) See *Parkes v. White*, 11 Ves. 228.

ceeds, she might, where the husband was not actuated by proper motives, be induced to divest herself of the property, and place it at the husband's disposal.

At the first introduction of the settlement to the separate use it was doubted whether, to accomplish the object, the interposition of an express trustee was not necessary (*p*); but it has since been determined that this precaution may be waived, for, rather than the intention shall be disappointed, the husband himself shall be construed a trustee for the wife (*q*). But, whether a trustee be expressly appointed or not, the intention of excluding the husband must not be left to inference, but must be clearly and unequivocally declared; for, as the husband is bound to maintain the wife, and bears the burden of her incumbrances, he has *prima facie* a right to her property (*r*); but, provided the meaning be certain, the Court will execute the intention, though the settlor may not have expressed himself in technical language (*s*).

The marital claims will be defeated if the gift be to the wife for her "sole and separate use (*t*)," or "her sole use (*u*)," or for "her livelihood (*x*)," or "that she

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| (<i>p</i>) <i>Harvey v. Harvey</i> , 1 P. W. 125; <i>Burton v. Pierpoint</i> , 2 P. W. 78. | J. Leach. |
| (<i>q</i>) <i>Bennet v. Davis</i> , 2 P. W. 316; <i>Parker v. Brooke</i> , 9 Ves. 583; <i>Rollfe v. Budder</i> , Bunb. 187; <i>Prichard v. Ames</i> , 1 Turn. & Russ. 222. | (<i>s</i>) <i>Darley v. Darley</i> , 3 Atk. 399, <i>per</i> Lord Hardwicke; <i>Stanton v. Hall</i> , 2 R. & M. 180, <i>per</i> Lord Brougham. |
| (<i>r</i>) <i>Ex parte Ray</i> , 1 Mad. 207, <i>per</i> Sir T. Plumer; <i>Wills v. Sayers</i> , 4 Mad. 409, <i>per eundem</i> ; <i>Massey v. Parker</i> , 2 M. & K. 181, <i>per</i> Sir C. Pepys; <i>Kensington v. Dollond</i> , 2 M. & K. 188, <i>per</i> Sir | (<i>t</i>) <i>Parker v. Brooke</i> , 9 Ves. 583; &c.
(<i>u</i>) <i>Adamson v. Armitage</i> , 19 Ves. 416; <i>S. C. Coop.</i> 283; <i>Ex parte Ray</i> , 1 Mad. 199; — <i>v. Lyne</i> , 1 Younge, 562.
(<i>x</i>) <i>Darley v. Darley</i> , 3 Atk. 399; but see <i>Lee v. Pricaux</i> , 3 B. C. C. 383. |

may receive and enjoy the profits (*y*),” or “to be at her disposal (*z*),” or “to be by her laid out in what she shall think fit (*a*),” or “for her own use independent of her husband (*b*);” for such expressions as these are clearly inconsistent with the notion of any interference on the part of the husband.

So, if the gift be accompanied with such expressions as “her receipt to be a sufficient discharge (*c*),” or “to be delivered to her on demand (*d*);” for in these cases the check put upon the husband’s legal right to receive could only have been with the intention of giving the wife a particular benefit.

But if the trust be “to pay to her,” or “to her and her assigns (*e*),” or the gift be “to her use (*f*),” or “her own use (*g*),” or “to pay into her own proper hands for her own use (*h*),” there is no such unequivocal evidence of an intention to exclude the husband.

Where property was vested in the *husband jointly with another*, as general trustees of the will, upon trust (*inter alia*) for the wife, it was held not to be a gift to her sepa-

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| (<i>y</i>) <i>Tyrrell v. Hope</i> , 2 Atk. 558. | 517. |
| (<i>z</i>) <i>Prichard v. Ames</i> , 1 Turn. | (<i>f</i>) <i>Jacobs v. Amyat</i> , 1 Mad. |
| & Russ. 222; <i>Kirk v. Paulin</i> , 7 | 376, n.; <i>Wills v. Sayers</i> , 4 Mad. |
| Vin. 96. | 411, <i>per</i> Sir T. Plumer; <i>Anon.</i> |
| (<i>a</i>) <i>Aitcherley v. Vernon</i> , 10 Mod. | <i>case</i> , cited 7 Vin. 96. |
| 531. | (<i>g</i>) <i>Johnes v. Lockhart</i> , in note |
| (<i>b</i>) <i>Wagstaff v. Smith</i> , 9 Ves. | to <i>Lee v. Pricaux</i> , 3 B. C. C. 383, |
| 520. | ed. by Belt; <i>Wills v. Sayers</i> , 4 |
| (<i>c</i>) <i>Lee v. Pricaux</i> , 3 B. C. C. | Mad. 409; <i>Roberts v. Spicer</i> , 5 |
| 381; <i>Woodman v. Horsley</i> , cited | Mad. 491. |
| <i>Ib.</i> 383; and see <i>Stanton v. Hall</i> , | (<i>h</i>) <i>Tyler v. Lake</i> , 2 R. & M. |
| 2 R. & M. 180. | 183; <i>Kensington v. Dollond</i> , 2 M. |
| (<i>d</i>) <i>Dixon v. Olmius</i> , 2 Cox, 414. | & K. 184; but <i>Hartley v. Hurle</i> , |
| (<i>e</i>) <i>Dakins v. Berisford</i> , 1 Ch. | 5 Ves. 545, <i>contra</i> . |
| Ca. 194; <i>Lumb v. Milnes</i> , 5 Ves. | |

rate use (i). Had the husband *alone* been appointed a trustee for the wife, the decision might have been different (k).

Of late years a struggle has been made to carry the doctrine of the separate use still higher, and the questions have been agitated, first, whether a fund given in trust for the separate use of a *feme sole*, without anticipation, may be disposed of by her at any time previously to marriage, and, secondly, whether, in default of any previous disposition, the property will vest by the marriage in the husband, or the trust for the separate use of the wife will be supported against his legal rights.

With reference to the first of these questions, it is at length clearly established, that a *feme sole* may dispose absolutely of a gift to her separate use (l); and the principle is briefly this—that wherever a person possessing an interest, however remote a possibility, is *sui juris*, that person cannot be restrained by any intention of the donor from exercising the ordinary rights of proprietorship. The fund may be limited “in trust for the separate use of the *feme*,” or “in trust for her, and, in the event of her marriage, to her separate use,” or “in trust for her separate use in the event of her marriage,” without the gift of any estate independently of that contingency; but in all these cases the interest, whether vested or contingent, is in favour of one who is now *sui juris*, and who therefore cannot be restrained from disposing of property,

(i) *Ex parte Beilby*, 1 Glyn & J. 167; and see *Kensington v. Dollond*, 2 M. & K. 184.

(k) *Ex parte Beilby*, *ubi supra*; and see *Darley v. Darley*, 3 Atk. 399.

(l) *Jones v. Salter*, 2 R. & M. 208; *Woodmeston v. Walker*, 2 R. & M. 197; *Brown v. Pocock*, 1b.

210; *S. C.* 2 M. & K. 189; and see *Massey v. Parker*, 2 M. & K. 174.

to which she either now is, or may eventually become, entitled.

Upon the subject of the second question, it seems difficult, as to principle, to discover upon what ground the Court can hold the trust for the separate use to arise upon the marriage; for, first, it cannot be said there is any *necessity* for such a doctrine with the view of protecting the *feme* in the due enjoyment of her property, for, having an absolute power of disposition over the interest before her marriage, she may settle it in whatever manner she pleases by express contract; and, if she marry without such special agreement, the legal presumption must be, that she intended the marriage itself to operate as a gift of it to the husband. It may be thought *hard* perhaps that a father should not be allowed to tie up the property of his daughter against the effects of a future coverture (*m*); but is it not equally hard he should not be allowed to fetter the ownership of a weak and extravagant son? The law must proceed upon *general* principles, and the rule is, that every person, whether *male* or *female*, who is *sui juris*, has a legal capacity, and therefore cannot be restrained in the exercise of the rights of property even at the will of a parent. Besides, if the father were allowed to tie up the property of his daughter, his will should be *imperative*; whereas it is now on all hands agreed, that the *feme*, while sole, may dispose of the property at pleasure by an *express assignment*, even in favour of her husband. But the principal objection is, that the exclusion of the marital rights would be a repugnancy to the estate itself; for now is it not an utter inconsistency, that, when the *feme* is so absolutely the owner

(*m*) See *Benson v. Benson*, 6 Sim. 130.

of the fund that it may be paid into her own hands by the trustees, or may be assigned by her to a mere volunteer, or may become vested by bankruptcy or insolvency in her assignees, the marriage shall not be a transfer of it to the husband, a purchaser for valuable consideration? And what an anomalous species of estate would otherwise be created!—the *feme*, while sole, to be the absolute owner; in the event of her marriage, the separate use to spring up, and the power of anticipation to be checked; on the death of the husband, the *feme* to be absolute owner again; and, in case of a second marriage, the fetter to be renewed. This would indeed be a strange and monstrous species of estate, and such as could not be admitted without violence to the first principles of equity.

In Lord Hale's time, when trusts were looked upon as "neither chattels nor inheritances, but amphibious sorts of things, and of an unnatural generation (*n*)," it was laid down broadly, that "if a *feme covert* had a trust for years, her husband could not dispose of it as he might of a term not in trust (*o*);" but Lord Nottingham, who was the first to put trusts upon a reasonable foundation, determined that the equitable estate must follow the nature of the legal; and, as the husband could dispose of the wife's legal chattel, he ought not to be restrained from the disposition of the equitable (*p*). But, in abandoning the narrow doctrine of Lord Hale, his Lordship still made one reservation, that, if a term were assigned *expressly* upon trust for the separate use of a *feme*,

(*n*) *Attorney-General v. Sands*,
Hard. 492.

(*p*) *Bullock v. Knight*, 1 Ch. Ca.
266.

(*o*) *Ib.* 496.

the marital rights in that case should not prevail (q); but this position, grounded on the old notion that in a trust the intention should govern however anomalous to the maxims of law (r), was subsequently overruled by the House of Lords in the celebrated *Sir Edward Turner's case*. Upon the marriage of Miss Ewer with Mr. Aston, lands had been demised to trustees for a term of ninety-nine years, determinable on the lady's death, upon trust to raise an annuity of 300*l.* for her jointure. Aston died, and the widow married Sir Edward Turner, and he disposed of the annuity for a valuable consideration. Lady Turner filed a bill for her jointure, and the question was argued, whether, as the second husband had not bound himself by any agreement, he was not at liberty to dispose of the wife's annuity. It was insisted on, that, though the first husband could not aliene, the second might, for it was no more than, if a wife were *cestui que trust* of a term, the husband might sell. But Lord Nottingham followed up his former resolutions by declaring, that, as the annuity had been settled *expressly* for the lady's personal use, the second husband was barred (s). "If a husband," he said, "make a lease for years in trust for the wife voluntary, and he sells, this may bind the wife because of the fraud. But *where a trust is created (to make provision) for a wife, as here in this case, bonâ fide, the husband can in no wise bind the wife, else no man should be able to provide for wife or children.*" Against this decree an appeal was carried to the House of Lords, and the decision below was reversed (t).

(q) *Doyly v. Perfull*, 1 Ch. Ca. General, Ib. 469.

225; *Draper's case*, Freem. 29.

(s) 1 Ch. Ca. 307.

(r) *Attorney-General v. Sands*,
Hard. 494; *Pawlett v. Attorney-*

(t) 1 Vern. 7.

In *Hunt v. Pit* (*u*), which occurred not many years after, a *feme*, by indenture executed before marriage, and sealed in the presence of her intended husband, assigned a term of years in trust to be at her disposal, whether sole or covert. She married, and the creditors of the husband took the term in execution, and sold it, and the purchasers filed a bill against the trustees to compel them to assign (*x*). Lord Nottingham said—"There was possibly at first no great reason for the old resolutions, that the husband could not dispose of a trust for the *feme*; but, the law being so settled, people had made provisions for their children according to what the law was then taken to be; and now those provisions were defeated by this new resolution, so that it was almost impossible for a man so to provide for his child but it should be subject to the disposal of an extravagant husband." And he commended the saying of Chief Baron Walter, viz. "it is no matter what the law is, so it be known what it is." But at last he said, he must be concluded by the Lords' judgment, and so decreed it according to *Chief Baron Turner's case*, observing, "there must not be one sort of equity above stairs in the House of Lords, and another below stairs in the Court of Chancery (*y*)." And "though it appeared," he said, "in this case the husband had notice before the marriage that the wife had settled the said term in trustees, yet that would not hurt him, because, if the law be that he should have power over it, his knowing it would in no sort prejudice him; but if a man before marriage were made a party to the assignment, or did make an agreement not to dispose of it, there it should not be in his power

(*u*) Freem. 78; S. C. 2 Ch. Ca.
73; S. C. 1 Vern. 18.

(*x*) 2 Ch. Ca. 73.
(*y*) 1 Vern. 18.

to dispose of the trust (z)." The authority of *Chief Baron Turner's case* was also recognised by the Court a few years after in the case of *Tudor v. Samyne* (a). Thus, more than a century and a half ago, it was decided and settled that the property of a *feme sole*, though in trust for her separate use, could not be withdrawn from the marital rights without an express contract with the husband.

We now come to an examination of what may be called the modern authorities upon the subject.

It has been established by numerous cases, that, if a fund be settled to the separate use of a *feme* in contemplation of marriage, and the husband afterwards die, and the widow marry again, the second husband shall not be excluded from his ordinary marital rights (b); but as it may be said it was not the intention of the parties, either expressly or impliedly, to make provision for any marriage but the one then contemplated, we shall proceed to the cases to which the same objection cannot be raised.

The authority of a common law court is not perhaps, upon a nice question of equity, entitled to any considerable weight; however, in *Beable v. Dodd* (c), it was assumed by Judges Willes, Ashurst, and Buller, that a settlement to the separate use of a *feme sole* was a recognised interest. A testator had devised the manor of Wrangton to A. and his heirs during the life of B., a married woman, upon trust for her separate use. The husband of B. died in the lifetime of the testator, and by a codicil, in which the testator noticed that event, the limi-

(z) Freem. 78.

(a) 2 Vern. 270.

(b) *Barton v. Briscoe*, Jac. 603;
Benson v. Benson, 6 Sim. 126;

Knight v. Knight, Ib. 121; *Jones v. Salter*, 2 R. & M. 208.

(c) 1 T. R. 193.

tation in favour of the *feme* was confirmed. B., after the death of the testator, married again, but the manor of Wrangton was not adverted to by the parties at the time of the settlement. It was held, the trust for the separate use was intended by the testator as a protection against any husband that B. might marry, and no objection was taken on the ground that such a trust was not valid in equity.

In *Newton v. Reid* (*d*) a testator gave to trustees a sum of money upon trust to purchase an annuity of 50*l.* for the life of his unmarried daughter, Mary Newton, and directed his trustees to “pay the said annuity into the proper hands of his daughter, whose receipt alone, notwithstanding any husband she might thereafter have, should be a sufficient discharge; it being the testator’s desire that the annuity should not be subject to the control of any husband she might have; but that his said daughter should not be at liberty to sell or dispose of the said annuity, or, if she did, such sale should be void and of no effect.” Mary Newton, after the testator’s death, married George Appleton, and they mortgaged their interest in the legacy, and presented a petition to the Court that the annuity might not be purchased, but the money be applied in discharge of the mortgage, and the residue paid over to Appleton. The Vice-Chancellor determined that, as the annuity was not limited over upon alienation, the restrictions were inoperative, and so made the order in pursuance of the prayer. It does not appear from the report whether the *feme* was examined separately from her husband or not; and, supposing her not to have been examined, the case would authorize the distinction sub-

(*d*) 4 Sim. 141.

sequently taken by the Vice-Chancellor (e), that, although the clause against anticipation could not be supported, the settlement to the separate use might nevertheless be decreed; but, on reference to the Registrar's Book (f), it appears *the consent of the feme was taken by the Court*; and thus *Newton v. Reid* must be considered an authority that a fund limited to the separate use of a *feme sole* will, notwithstanding her subsequent coverture, be regarded in the light of an ordinary *chose en action*, and therefore not to be assigned by her without examination in court.

In *Woodmeston v. Walker* and *Brown v. Pocock* (g) it had been held by Sir John Leach, that even the anticipation of the growing payments might be restrained in a *feme sole*: *a fortiori*, therefore, his opinion was, that the mere settlement to the separate use, in the event of a future coverture, would be supported by the Court. But *Woodmeston v. Walker* and *Brown v. Pocock* were overruled on appeal, and the following case was determined by his Honour before those decrees had been reversed:—A testator gave his real and personal estate (including some leaseholds for years) upon trust as to a moiety for his granddaughter, a *feme sole* and under age, “for her separate use, *exclusive of any husband with whom she might intermarry*.” The grand daughter married after the testator's death during her infancy, and by the settlement it was declared the trustees should dispose of the testator's estate, and stand possessed of the proceeds upon the trusts in the settlement mentioned. The trustees contracted for the sale of the leaseholds, and the

(e) *Benson v. Benson*, 6 Sim.
131.

(f) B. 1830, fol. 508.

(g) *Ubi supra*.

purchaser objected to the title on the ground, that, the trust of the will being for the separate use of the *feme*, the property did not by the marriage vest in the husband, and the *feme* herself, who was still an infant, had not bound herself by the settlement. Sir J. Leach was of opinion with the purchaser, that, during the infancy of the *feme*, no title could be made (*h*). A petition of appeal was presented to the House of Lords, but as the *feme* would attain her majority, and so have the power of confirming the sale, before the matter could be disposed of, the appeal was abandoned.

In *Massey v. Parker* (*i*) the will of the testatrix was, “that her two granddaughters, Eliza and Rebecca, (both *femes sole*,) should receive the full interest of all her residuary estate, and that the said interest should be for and *under the sole control* of the said Eliza and Rebecca, the principal to be equally divided for the use of the surviving issue, and that Mary Wadsworth, their mother, should have no control whatever over this property.” Eliza, after the testatrix’s decease, married Jedediah Wood, who, some time after, took the benefit of the insolvent act. The assignee filed a bill against the executors of the testatrix for payment of the legacy, and the executors demurred. Lord Cottenham, then M. R., said—“Two questions are raised by this demurrer; first, whether the testatrix has by her will given the income of the fund in question to the separate use of Eliza; and, secondly, whether, if she intended so to do, such intention is now to be carried into effect. *It is not material to say much upon the first point*; but I am of opinion the

(*h*) *Simson v. Jones*, 2 R. & M. 365. (*i*) 2 M. & K. 174.

will does not give the interest to Eliza separately from her husband. The *more important question* is, whether the intention, if sufficiently expressed, can, under the circumstances, have effect given to it, so as to deprive the husband of his ordinary right? The objection is, that, the legatee being unmarried at the time of the testatrix's death, the intended restriction was inconsistent with the nature of the interest given, and therefore inoperative. That an attempt so to fetter the interest of a male legatee cannot succeed was decided in *Brandon v. Robinson*, and that the same rule applies to an unmarried female legatee is established by *Woodmeston v. Walker*, and *Brown v. Pocock*. The only question therefore is, whether, where such fetters are attempted to be imposed upon an unmarried female legatee, and she marries without obtaining payment of the fund, such fetters are to operate during the coverture? *Why were they inoperative before the marriage? Because they were inconsistent with the nature of her estate. Her estate and interest, therefore, were absolute before marriage, and the trustee held the legacy for her absolutely: she might have taken it herself, or have given it to any one, and why may she not by the act of marriage give it to her husband?* Upon principle, therefore, I should not have had any doubt of the right of the husband, but the very point was decided in *Newton v. Reid*, and that case was alluded to without any expression of disapprobation by the Lord Chancellor in *Brown v. Pocock*. *I must, therefore, consider the point as settled."*

The case of *Anderson v. Anderson* (k), though decided many years previously, did not attract the notice of the

(k) 2 M. & K. 427.

profession, until the foregoing cases had been already determined.

A testator devised two leasehold houses to his unmarried daughter, "for her own and sole use, *free of control of any present husband or any husband to come.*" The daughter married after the death of the testator, and, disputes having arisen between her and her husband, she left him and went to the house of her mother. The husband took possession of the leasehold premises, and the wife filed a bill by her next friend, alleging that she was entitled to the property to her separate use. Before the defendant's answer had been put in, an injunction was applied for by motion to restrain the husband from receiving the rents of the houses. It appears on consulting the Registrar's Book (1), that only one affidavit was filed and that on the part of the plaintiff, by which it was proved the husband had all along considered the premises in question as the exclusive property of the wife; and that, to induce her to abandon her rights, he had driven her from the house, had threatened the life of herself and child, had spread malicious reports of her having robbed him of 500*l.*, and had otherwise been guilty of the grossest acts of outrage and violence. It was under these circumstances that the injunction was granted by Sir J. Leach, V. C.; and afterwards, on application to Lord Eldon to discharge the order, the motion was refused with costs. From the answer, which at last was put on the file, it appears the husband had been fully aware of the settlement of the property by the will to the feme's separate use, and had entered into a treaty as to the future enjoyment of it: the husband also

(1) A. 1820, fol. 1447.

admitted by his answer that he had actually agreed *not to sell* the houses: When the cause came to be heard on the merits before Sir J. Leach, it was decided the feme was entitled to the property to her separate use (*m*). The opinion of Sir John Leach upon this subject we have already had occasion to notice, but upon what grounds he determined this particular case, whether upon his own notion of the general principle, or upon the strength of any special agreement, does not appear from the report. Lord Eldon's decision upon the motion amounts apparently to no more than this: The feme had *alleged* by her bill that she was entitled to the property to her separate use: the husband had not put in his answer, but it appeared from the affidavit, the only evidence produced, that he had from the first considered the property as his wife's, and had been guilty of conduct that could not be too severely visited by the Court. Lord Eldon, under these circumstances, refused to dissolve the injunction at the instance of the husband; but whether the feme was eventually to establish her right to the property could only be determined upon the hearing of the merits.

The cases of *Brown v. Pocock* (*n*), *Davies v. Thornycroft* (*o*), and *Johnson v. Freeth* (*p*), have lately been decided by the V. C. In *Davies v. Thornycroft*, his Honour ruled that the limitation to the *separate use* of a feme sole would, in the event of coverture, take effect; but, he said, he wished it to be understood, that he *assumed as the foundation of his decision, that the Lord*

(*m*) The R. L. has been searched, but the entry of the decree has not been found.

(*n*) 5 Sim. 663.

(*o*) 6 Sim. 420.

(*p*) March 2nd, 1836. See 6 Sim. 423, note (*g*).

Chancellor had not decided otherwise in Massey v. Parker. In *Brown v. Pocock*, and *Johnson v. Freeth*, his Honour held, that the *nonanticipation clause* was not only void during the interval before coverture, but it could not be revived and set on foot by the subsequent event of coverture. Now this distinction appears to be a refinement that on principle is scarcely tenable. It is acknowledged even by those who are for maintaining the claims of the wife against the just consequences of coverture, that the nonanticipation permitted in a *feme covert* is not another and distinct violation of the common law incidents of property, but is supported for the mere purpose of giving full effect to the settlement to her separate use (q). Why, then, if a fund be settled to the separate use of a *feme sole*, and a clause be added against her anticipation, should not the minor and subordinate quality stand equally good with the principal to which it is annexed? But the restriction against alienation, it will be said, is inconsistent with the nature of an estate vested in a person *sui juris*, but not so the settlement to the *feme's* separate use. But where is even the shadow of a difference? If the nonanticipation be void because it is inconsistent with the estate before the coverture, why is not the settlement to the separate use also void, when the words "to the separate use" have, until the coverture commences, absolutely no meaning. If the separate use be allowed to spring up upon the marriage, what hinders the nonanticipation clause from beginning to operate at the same period? The cases, therefore, which have determined the invalidity of the restriction against alienation, are in fact

(q) See *Woodmeston v. Walker*, 2 R. & M. 169.

authorities against the validity of the settlement to the extent of the separate use.

The brief result of the authorities appears to be this. In support of the separate use, we have the undiscussed opinion of a common law court (*r*), the decision of Sir J. Leach, in *Simson v. Jones* (*s*), and, perhaps, in *Anderson v. Anderson* (*t*), and the decision of the present V. C. in *Davies v. Thornycroft* (*u*); but, as to the authority of Sir John Leach, the two cases determined by him were decided before his Honour's decrees in *Woodmeston v. Walker* (*x*) and *Brown v. Peacock* (*y*), which involved the same principle, had been reversed by a superior court; and the judgment of the V. C. was under the express reservation, that the Lord Chancellor had not otherwise decided in the case of *Massey v. Parker* (*z*). The opinion of Lord Eldon cannot, for the reasons before stated, be certainly collected upon this point (*a*). On the other hand, we have a direct decision of the question by Lord Nottingham after great consideration; and what was intended to be an equally direct decision by the present Lord Chancellor in *Massey v. Parker*. The cases also which have determined the invalidity of the nonanticipation clause, in the event of coverture, must, as before observed, be equally conclusive against the validity of the separate use. The question must undoubtedly be regarded as still *lis sub*

(*r*) *Beable v. Dodd*, 1 T. R. 193.

(*s*) 2 R. & M. 365.

(*t*) 2 M. & K. 427.

(*u*) 6 Sim. 420.

(*x*) 2 R. & M. 197.

(*y*) *Ib.* 210.

(*z*) 2 M. & K. 174.

(*a*) ——— *v. Lyne*, 1 Younge,

562, and *Jacobs v. Amyatt*, stated *Beresford v. Hobson*, 1 Mad. 376, note (*s*), have also been cited on the same side: but the former is too vague to merit attention (see *Massey v. Parker*, 2 M. & K. 182); and the latter will be found on examination not to apply to the subject.

judice; but, if principle is to prevail, the doctrines laid down by the Lord Chancellor in *Massey v. Parker* must eventually be successful.

We may conclude the present chapter with some remarks upon the *consequences* arising from the creation of an unlawful trust.

In *Cottingham v. Fletcher* (*b*), before Lord Hardwicke, a papist had assigned an advowson to A. B. for a term of ninety-nine years, for the purpose of evading the statutes which vested presentations of livings in the gift of papists in the two Universities. The grantor afterwards conformed to the protestant religion, and filed a bill against A. B., praying a discovery of the secret trust. The defendant pleaded the statute of frauds, by which all declarations of trust are required to be in writing, but admitted by his answer for what purposes the assignment had been made. Lord Hardwicke held, that, if the plea had stood by itself, it might have been good enough, but, coupled with the answer, which was a full admission of the facts, it ought to be overruled; but his Lordship added, "If the defendant had *demurred* to the bill, it might have been of a different consideration; for, as the assignment was done in fraud of the law, he doubted at the hearing, whether the plaintiff could be relieved, such fraudulent conveyances being made absolute against the grantor." The opinions of Lord Eldon are expressed in the following remarks upon this case: "Lord Hardwicke," he observed, "is made to say, that, upon the admission of the trust by the defendant, he would act. I do not know whether he *did* act upon it, but it is questionable whether he *should*, for there is a great difference between the case of an *heir*

(*b*) 2 Atk. 155.

CHAPTER XI.

OF TRUSTS BY OPERATION OF LAW.

HAVING discussed the various questions involved in the creation of trusts by the act of a party, we shall now direct our attention to the subject of trusts arising by operation of law.

A trust of this kind may be said to arise in three ways: 1st. Where the trust is created by law solely and entirely. 2ndly. Where a trust already in existence is created *de novo* by operation of law as against this particular property. 3rdly. Where a trust already in existence, and annexed to the present subject matter, is created *de novo* by operation of law, as against this particular person.

I. Trusts of the first kind arise in the two following cases :—

1. Where an estate is purchased in the name of one person, and the consideration is paid by another; when, to use the language of Lord Chief Baron Eyre, it is the clear result of all the cases without a single exception, that the trust of the legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one

name or several, whether jointly or *successive*, results to the man who advances the purchase money (a).

But if the conveyance be taken in the name of a child, in that case, as the parent is under an obligation to provide for his offspring, the purchase will be regarded *primâ facie* as a gift or advancement (b); but the intention of making a provision for the child is a mere presumption of law, and, as such, may be rebutted by the production of positive evidence to the contrary (c).

2. The other instance in which this kind of trust arises, is where, upon a conveyance or will, the grantee, devisee, or legatee is intended to take the mere legal estate, and the equitable interest, either wholly or partially, is left undisposed of; when so much of the beneficial interest as has not been expressly given away will, if arising out of the settlor's realty, result to himself or his heir, or, if out of the personal estate, to himself or his executor. But if the interest resulting to the heir be of a chattel nature, as a term of years, or a sum of money, it will, on the death of the heir, devolve on his personal representative (d).

The intention of excluding the person invested with the legal estate from the usufructuary enjoyment, may either be *presumed* by the Court, or be actually *expressed* upon the instrument.

The *presumption* arises, wherever, upon a convey-

(a) *Dyer v. Dyer*, 2 Cox, 93. but see *Redington v. Redington*, 3 Ridg. 195; and see *Taylor v. Taylor*, 1 Atk. 387; *Lamplugh v. Lamplugh*, 1 P. W. 111.

(b) See Vend. & Purch. Ch. 15, sect. 2, div. 2.

(c) See *Dyer v. Dyer*, 2 Cox, 92; *Fordyce v. Willis*, 3 B. C. C. 587;

(d) *Levet v. Needham*, 2 Vern. 138; *Wych v. Packington*, 3 B. P. C. 44.

ance (*e*), devise (*f*), or bequest (*g*), a trust is declared of part of the estate, and nothing is said as to the residue, for then the creation of the partial trust is considered to have been the sole object in view, and the interest that is undisposed of by the settlor results to him or his representative. Should an estate be granted to a volunteer, and no trust be declared of *any part* of it, a trust of the *whole* will not result to the settlor (*h*), nor can any trust be raised without the formalities required by the statute of frauds (*i*). But if the transaction be vitiated by any *mala fides* on the part of the grantee, the Court, on the establishment of that fact, will set aside the conveyance (*k*); but if the grantor himself intended a fraud upon the law, the assurance, if the defen-

(*e*) *Cottington v. Fletcher*, 2 Atk. 155; *Culpepper v. Aston*, 2 Ch. Ca.

115; *Cook v. Gwavas*, cited *Roper v. Radcliffe*, 9 Mod. 187. *Lloyd v. Spillet*, 2 Atk. 150; *S. C. Barn.* 388, *per* Lord Hardwicke.

(*f*) *Sherrard v. Lord Harborough*, Amb. 165; *Marquis of Townshend v. Bishop of Norwich*, cited *Sanders on Uses*, C. 3, s. 7, div. 3; *Hobart v. Countess of Suffolk*, 2 Vern. 644; *Nash v. Smith*, 17 Ves. 29; *Wyche v. Packinton*, cited *Roper v. Radcliffe*, 9 Mod. 187; *Davidson v. Foley*, 2 B. C. C. 203; *Kiricke v. Bransbey*, 2 Eq. Ca. Ab. 508; *Levet v. Needham*, 2 Vern. 138; *Halliday v. Hudson*, 3 Ves. 210; *Killett v. Killett*, 3 Dow, 248; &c.

(*g*) *Robinson v. Taylor*, 2 B. C. C. 589; and see *Dawson v. Clarke*,

18 Ves. 254.

(*h*) *Lloyd v. Spillet*, Barn. 384; *S. C.* 2 Atk. 148; *Young v. Peachy*, 2 Atk. 257, *per* Lord Hardwicke; but see *Duke of Norfolk v. Browne*, Pr. Ch. 80; *S. C.* 1 Eq. Ca. Ab. 381; *Lady Tyrrell's case*, Freem. 305; *Warman v. Seaman*, Id. 308; *Sculthorp v. Burgess*, 1 Ves. jun. 92.

(*i*) *Hutchins v. Lee*, 1 Atk. 448, *per* Lord Hardwicke; *Lloyd v. Spillet*, 2 Atk. 151, *per eundem*; *Bellasis v. Compton*, 2 Vern. 294; *S. C.* 1 Eq. Ca. Ab. 381.

(*k*) *Lloyd v. Spillet*, 2 Atk. 150, *S. C. Barn.* 388, *per* Lord Hardwicke; *Hutchins v. Lee*, 1 Atk. 448, *per eundem*; *Young v. Peachy*, 2 Atk. 254; *Wilkinson v. Brayfield*, cited *Id.* 257; *S. C.* reported 2 Vern. 307.

dant demurs, will be made absolute against the grantor (*l*); if the defendant admit the trust, it seems the Court will relieve (*m*).

Upon this subject a distinction must be observed between a devise to a person for a particular purpose with no intention of conferring the beneficial interest, and a devise with the view of conferring the beneficial interest but subject to a particular injunction. Thus, if lands be devised to A. *upon trust to pay debts*, this is simply the creation of a trust, and the residue will result to the heir; but if the devise be to A. *charged with debts*, the intention of the testator is to devise beneficially subject to the charge, and then whatever remains after the charge has been satisfied will belong to the devisee (*n*).

No positive rule can be laid down in what cases the devise will carry with it a beneficial character, and in what it will be construed a trust; but on all occasions the Court, refusing to be governed by the mere technical phraseology, extracts the probable intention of the settlor from the general scope of the instrument (*o*).

A testator had devised an advowson to "his honoured mother-in-law, G. S., willing and desiring her to sell and dispose of the same to Eton College, or Trinity College Oxford, or, in the event of their refusal, to any college in Oxford or Cambridge that would be the best purchaser;" and Lord Hardwicke, in decreeing G. S. to take beneficially, observed, "The general rule, that, where

(*l*) *Cottington v. Fletcher*, 2 Atk. 156, *per* Lord Hardwicke; and see *Chaplin v. Chaplin*, 3 P. W. 233; *Muckleston v. Brown*, 6 Ves. 68.

(*m*) See *Cottington v. Fletcher*, *Muckleston v. Brown*, *ubi supra*.

(*n*) *King v. Denison*, 1 V. & B. 272, *per* Lord Eldon.

(*o*) *Hill v. Bishop of London*, 1 Atk. 620, *per* Lord Hardwicke; *Walton v. Walton*, 14 Ves. 322, *per* Sir W. Grant; *Starkey v. Brooks*, 1 P. W. 391, *per* Lord Cowper; *King v. Denison*, 1 V. & B. 279, *per* Lord Eldon.

lands are devised for a particular purpose, what remains after that particular purpose is satisfied results, admits of several exceptions. If J. S. devise lands to A. to sell them to B. for the particular advantage of B. that advantage is the only purpose to be served according to the intent of the testator, and to be satisfied by the mere act of selling, let the money go where it will; yet there is no precedent of a resulting trust in such a case. Nor is there any warrant from the words or 'intent of' this testator to say, the devise severs the beneficial interest, but is only an injunction on the devisee to enjoy the thing devised in a particular manner. The testator gives the advowson to G. S., but if such or such a college will buy it, then he lays an injunction upon her to sell; and therefore there are two objects of the testator's benevolence, G. S. and the colleges. One circumstance differs the case from all that have been put: the word 'trust' is not made use of, and if G. S. is a trustee it must be by construction, and then the intent of the testator must be chiefly considered as a guide to that construction: and though many other words will create a trust, yet that must be where the intent of the testator is apparent; but here 'willing and desiring' are more properly words of injunction than trust. No general rule is to be laid down, unless where a real estate is devised to be sold for payment of debts, and no more is said; there it is clearly a resulting trust: but if a particular reason occurs, why the testator should intend a beneficial interest to the devisee, there are no precedents to warrant the Court to say it shall not be a beneficial interest (*p*)."

In *Dawson v. Clark* (*q*) a testator gave and bequeathed

(*p*) *Hill v. Bishop of London*, 1 Atk. 618.

(*q*) 15 Ves. 409.

all his estate and effects to his friends, J. W. and R. C., their heirs executors administrators and assigns, *upon trust in the first place to pay, and charged and chargeable with*, his debts, funeral expenses, and legacies, thereinafter bequeathed. Sir W. Grant did not enter into the consideration of the question, but decided the case upon another ground; but Lord Eldon determined it to be a beneficial devise. "The difficulty," he said, "I feel is, whether I am to construe the words 'upon trust,' to mean 'charged and chargeable,' or 'charged and chargeable,' to mean 'in trust;'" and, upon the whole will, his Lordship thought the devise and bequest gave the absolute property, subject only to a charge (r).

In another case a testator gave 5*l.* to his brother, who was his heir at law, and "made and constituted *his dearly beloved wife* his sole heiress and executrix, to sell and dispose thereof at her pleasure, and to pay his debts and legacies;" and Lord King said, the devise that the wife should be sole heiress of the real estate did, in every respect, place her in the stead of the heir, and not as a trustee for him; that it was plainer by reason of the language of tenderness and affection, "*his dearly beloved wife*," which must intend to her something beneficial, and not what would be a trouble only; and what made it still stronger was, that the heir was not forgot, but had a legacy of 5*l.* left him; and so his Lordship decreed the devisee to be beneficially entitled (s).

The recognition of the relationship of the devisee has often, as in the case last cited, materially influenced the Court against the construction of a mere trust (t); but

(r) *S. C.* 18 Ves. 247, see 257. *Wentworth*, cited *Robinson v. Taylor*, 2 B. C. C. 594; *Smith v. King*,

(s) *Rogers v. Rogers*, 3 P. W. 193. 16 East, 283; *Cunningham v. Mel-*

(t) *Floyd v. Spillet*, cited *Cook v. Duckenfield*, 2 Atk. 566; *Lloyd v. lish*, Pr. Ch. 31.

any allusion of the kind is merely one circumstance of evidence, and therefore to be counteracted by the language of other parts of the instrument (*u*).

Although the introduction of the words "upon trust" may be strong evidence of the intention not to confer on the devisee a beneficial interest (*x*), yet that construction may be negated by the context, or the general scope of the instrument (*y*): and, in like manner, the devisee may be designated as "trustee;" but if the term be used with reference to one only of two funds, he may still establish his title to the beneficial interest in the other (*z*).

It must also be observed, that, as the heir is a person highly favoured in law, he will not be excluded from the resulting trust on bare conjecture (*a*); and there must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that no benefit was intended to the heir; for the trust results to the real representative, not on the ground of intention, but because the ancestor has declared no intention (*b*). Thus, a legacy to the heir will not prevent a trust from resulting (*c*);

(*u*) *Buggins v. Yates*, 9 Mod. 122; *Wych v. Packington*, 2 Eq. Ca. Ab. 507; and see *King v. Denison*, 1 V. & B. 274.

(*x*) See *Hill v. Bishop of London*, 1 Akt. 620; *Woollett v. Harris*, 5 Mad. 452.

(*y*) *Dawson v. Clarke*, 15 Ves. 409; *S. C.* 18 Ves. 247, see 257; *Coningham v. Mellish*, Pr. Ch. 31.

(*z*) *Batteley v. Windle*, 2 B. C. C. 31; *Pratt v. Sladden*, 14 Ves. 193; and see *Gibbs v. Rumsey*, 2 V. & B. 294.

(*a*) *Halliday v. Hudson*, 3 Ves.

211, *per* Lord Loughborough; and see *Kellett v. Kellett*, 3 Dow, 248; *Amphlett v. Parke*, 2 R. & M. 227; *Phillips v. Phillips*, 1 M. & K. 661.

(*b*) See *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Tregonwell v. Sydenham*, 3 Dow, 211; *Lloyd v. Spillet*, 2 Atk. 151; *Habergham v. Vincent*, 2 Ves. jun. 225.

(*c*) *Randall v. Bookey*, 2 Vern. 425; *S. C.* Pr. Ch. 162; *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Starkey v. Brooks*, 1 P. W. 390, overruling *North v. Crompton*, 1 Ch. Ca. 196.

but, joined to other circumstances in favour of the devisee, it will not be without its effect (*d*).

Where property has been given to a corporation upon trust for certain charitable purposes that do not exhaust the whole proceeds, the Court has held, that, the corporation itself being an object of charity, the donor's intention was not to treat the corporation as a mere trustee, but to endow it with the surplus (*e*).

It need scarcely be remarked, that, as the species of trust we are now considering results by *presumption of law*, it may be rebutted by positive evidence, by parol, that the testator's intention was to confer the surplus interest beneficially (*f*).

Next, a trust results by operation of law, where the intention not to benefit the grantee, devisee, or legatee, is *expressed* upon the instrument itself, as if the conveyance, devise, or bequest, be to a person "upon trust," and no trust is declared (*g*), or upon certain trusts that are too vague to be executed (*h*), or upon trusts to be

(*d*) *Rogers v. Rogers*, 3 P. W. 193; *S. C.* Sel. Ch. Ca. 81; and see *Docksey v. Docksey*, 2 Eq. Ca. ab. 506; *King v. Denison*, 1 V. & B. 274; *Amphlett v. Parke*, 2 R. & M. 230; *Mallabar v. Mallabar*, Cas. t. Talb. 78.

(*e*) See *Attorney-General v. Mayor of Bristol*, 2 Jac. & Walk. 308, 317, 332; *In re Yordon's Charity*, 5 Sim. 571; *Attorney-General v. Skinners' Company*, Id. 596.

(*f*) *Crompton v. North*, as cited *Gainsborough v. Gainsborough*, 2 Vern. 253; *Docksey v. Docksey*,

2 Eq. Ca. Ab. 506; *Mallabar v. Mallabar*, Cas. t. Talb. 78.

(*g*) *Dawson v. Clarke*, 18 Ves. 254, *per* Lord Eldon; see *Southouse v. Bate*, 2 V. & B. 396; *Morice v. Bishop of Durham*, 10 Ves. 537; *Woollett v. Harris*, 5 Mad. 452; *Pratt v. Sladden*, 14 Ves. 198; *Dunnage v. White*, 1 Jac. & Walk. 583.

(*h*) *Fowler v. Garlike*, 1 R. & M. 232; *Morice v. Bishop of Durham*, 9 Ves. 399; *S. C.* 10 Ves. 522; *Leslie v. Devonshire*, 2 B. C. C. 187; *Vezey v. Jamson*, 1 Sim. & Stu. 69.

thereafter declared, and no declaration is ever made (*i*), or upon trusts that are void for unlawfulness (*k*), or that fail by lapse (*l*), &c.; for in such cases the trustee can have no pretence for claiming the beneficial ownership, when, by the express language of the instrument, the whole property has been impressed with a trust.

And where, as in the foregoing cases, a trust results to the settlor or his representative, not by presumption of law, but by force of the written instrument, the trustee is not at liberty to defeat the resulting trust by the production of extrinsic evidence by parol (*m*).

Having thus distinguished between the two kinds of resulting trusts, (a classification necessary to be made for the purpose of ascertaining the admissibility of parol evidence,) we proceed to introduce a few remarks applicable to resulting trusts generally, whether arising by presumption of law or from the language of the instrument.

1. If real estate be devised upon trust to sell for a particular purpose, and that purpose either wholly fails or

(*i*) *Emblyn v. Freeman*, Pr. Ch. 3 M. & K. 262.

541; *City of London v. Garway*, 2 Vern. 571; *Collins v. Wakeman*, 2 Ves. jun. 683; and see *Brown v. Jones*, 1 Atk. 188; *Sidney v. Shelley*, 19 Ves. 352; *Brookman v. Hales*, 2 V. & B. 45.

(*k*) *Carrick v. Errington*, 2 P. W. 361; *Arnold v. Chapman*, 1 Ves. 108; *Tregonwell v. Sydenham*, 3 Dow, 194; *Jones v. Mitchell*, 1 S. & S. 290; *Gibbs v. Rumsey*, 2 V. & B. 294; *Page v. Leapingwell*, 18 Ves. 463; and see *Cooke v. The Stationers' Company*,

(*l*) *Ackroyd v. Smithson*, 1 B. C. C. 503; *Spink v. Lewis*, 3 B. C. C. 355; *Williams v. Coade*, 10 Ves. 500; *Digby v. Legard*, cited *Cruce v. Barley*, 3 Cox's P. W. 22, note (1); *Hutcheson v. Hammond*, 3 B. C. C. 128.

(*m*) See *Langham v. Sanford*, 17 Ves. 442; *S. C.* 19 Ves. 643; *Rachfield v. Careless*, 2 P. W. 158; *Gladding v. Yapp*, 5 Mad. 59; *White v. Evans*, 4 Ves. 21; *Walton v. Walton*, 14 Ves. 322.

does not exhaust the proceeds, the part that remains unapplied, whether the estate has been actually sold or not, will result to the testator's heir, and not to his next of kin (*n*). And the whole or surplus will result in this manner, though the proceeds of the realty be blended with personal estate in the formation of one common fund (*o*). And even an express declaration that the proceeds of the sale shall be considered as part of the testator's personal estate will not prevent the operation of the rule (*p*); for a direction of this kind is construed to extend to the purposes of the *will* only, and not to give a right to those who claim, as the next of kin, by *operation of law*. In the late case of *Phillips v. Phillips* (*q*), before Sir J. Leach, the proceeds of the sale were directed

- (*n*) *Starkey v. Brooks*, 1 P. W. 390; *Randall v. Bookey*, Pr. Ch. 162; *Stonehouse v. Evelyn*, 3 P. W. 252; *Robinson v. Taylor*, 2 B. C. C. 589; *Cruse v. Barley*, 3 P. W. 20; *Buggins v. Yates*, 2 Eq. Ca. Ab. 508; *Hill v. Cock*, 1 V. & B. 173; *City of London v. Garway*, 2 Vern. 571; *Nicholls v. Crisp*, cited *Croft v. Slee*, 4 Ves. 65; *Digby v. Legard*, 2 Dick. 500; *Spink v. Lewis*, 3 B. C. C. 355; *Chitty v. Parker*, 4 B. C. C. 411; *Collins v. Wakeman*, 2 Ves. jun. 683; *Howse v. Chapman*, 4 Ves. 542; *Williams v. Coade*, 10 Ves. 500; *Berry v. Usher*, 11 Ves. 87; *Gibbs v. Rumsey*, 2 V. & B. 294; *Maugham v. Mason*, 1 V. & B. 410; *Wilson v. Major*, 11 Ves. 205; *Wright v. Wright*, 16 Ves. 188; *Hooper v. Goodwin*, 18 Ves. 156; *Jones v. Mitchell*, 1 S. & S. 290; *Page v. Leapingwell*, 18 Ves. 463. Note, *Countess of Bristol v. Hungerford*, 2 Vern. 645, is misreported—see *Rogers v. Rogers*, 3 P. W. 194, note (C).
- (*o*) *Ackroyd v. Smithson*, 1 B. C. C. 503; *Jessopp v. Watson*, 1 M. & K. 665.
- (*p*) *Collins v. Wakeman*, 2 Ves. jun. 683; and see *Amphlett v. Parke*, 2 R. & M. 226. *Ogle v. Cook*, cited in *Fletcher v. Ashburner*, 1 B. C. C. 502, and in *Ackroyd v. Smithson*, Id. 513, was for a long time considered *contra*; but in *Collins v. Wakeman*, 2 Ves. jun. 686, Lord Loughborough had the Reg. Lib. searched, and it was found the point had been left undecided.
- (*q*) 1 M. & K. 649.

to be taken as part of the testator's personal estate, and were blended into one fund with the personalty, and a legacy which had lapsed was decreed in favour of the next of kin; but the opinion of the profession is understood to be against the decision; and it is observable, that *Collins v. Wakeman*, the only authority precisely in point, was not once adverted to in this case either by the bar or the bench. But if a testator direct the proceeds of the sale to be taken as personal estate, and *nothing more is said*, then, as every part of the will ought, if possible, to have an operation, the meaning of the testator may be thought to be, that the realty should be converted into personalty for the benefit of the next of kin; and, indeed, in *The Countess of Bristol v. Hungerford* (r), where the testator directed the proceeds of the sale to be taken as personal estate, and go to his executors, to whom he gave 20*l.* a-piece, it was actually decided that the next of kin were entitled.

If the execution of the trust require the estate to be sold, but the purposes of the trust do not exhaust the proceeds, the part that is undisposed of will result to the heir in the character of personalty, and, though the sale was not actually effected in his lifetime, will devolve on his executor (s); but if the trusts declared by the testator do so entirely fail as not to call for a conversion, then the whole estate will result to the heir as realty, and descend upon his heir (t).

(r) 2 Vern. 645; *S. C.* Pr. Ch. 484; *Dixon v. Dawson*, 2 S. & 81; corrected from Reg. Lib., in St. 327; *Jessopp v. Watson*, 1 M. & K. 665.
note (C).

(s) *Hewitt v. Wright*, 1 B. C. C. 86; *Wright v. Wright*, 16 Ves. 188; *Smith v. Claxton*, 4 Mad. 271.
(t) *Smith v. Claxton*, *ubi supra*; *Chitty v. Parker*, 2 Ves. jun. 271.

The doctrines upon this subject have been very clearly put by Sir John Leach in the case of *Smith v. Claxton* (u). A testator by one devise had given an estate to trustees and their heirs upon trust to sell, and out of the proceeds to pay his funeral expenses, debts, and legacies, and, subject thereto, upon trust to pay the surplus to his wife. By a second devise he had given an estate to the same trustees and their heirs, upon trust to pay the rents to his wife for life, and after her death to Thomas for life, and after his death upon trust to sell and divide the proceeds amongst the children of Thomas, and, failing such children, between Joseph and Robert in equal shares. By a third devise he had given an estate to the same trustees and their heirs, upon trust, subject to an annuity, for Robert for life, and after his decease upon trust to sell and apply the produce for the benefit of the children of Robert, and, failing such children, upon trust for Thomas and Joseph in equal shares. The wife died in the lifetime of the testator; Robert also died in the lifetime of the testator without issue; Thomas survived the testator, but died a few months after, having had an only child, who had died in the testator's lifetime. Sir John Leach said—“Where a deviser directs his real estate to be sold, and the produce to be applied to particular purposes, and those purposes partially fail, the heir-at-law is entitled to that part of the produce which in the events is thus undisposed of. The heir-at-law is entitled to it because the real estate was land at the deviser's death, and this part of the produce is an interest in that land not effectually devised, and which therefore descends to the heir. A deviser may

(u) 4 Mad. 484.

give to his devisee either land or the price of land at his pleasure, and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the devisor. If it be the purpose of the testator to give land to the devisee, the land will descend to his heir; if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of his personal estate. Under every will, when the question is, whether the devisee, or the heir failing the devisee, takes an interest in land as land or money, the true inquiry is, whether the devisor has expressed a purpose, that, in the events which have happened, the land shall be converted into money. Where a devisor directs his land to be sold and the produce divided between A. and B., the obvious purpose of the testator is, that there shall be a sale for the convenience of division, and A. and B. take their several interests as money, and not land; and if A. die in the lifetime of the testator, and the heir stands in his place, the purpose of the devisor still applies to the case, and the heir shall take the share of A., as A. himself would have taken it, as money, and not land: but if A. and B. *both* die in the lifetime of the testator, and the *whole* interest in the land descends to the heir, the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the testator being that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devise wholly failed, and the heir would therefore take the whole interest as land. To apply these principles to the present case; under

the first devise, the estate is directed to be sold, and the produce applied in aid of the personal estate in payment of debts and legacies, and the surplus is given to the wife. The debts and legacies are fully paid out of the personal estate, and the wife dies in the testator's lifetime. The whole interest thus resulted to the heir, and the devisor's purpose of sale, being plainly for a distribution according to the will, has no application to the events which have happened, and the heir took the estate as land which descends in that character to his heir. Under the second devise, there is an obvious purpose of sale for the convenience of division between the sons of Thomas, or, failing them, between Joseph and Robert. The only son of Thomas, and the devisor's son Robert, both die in the devisor's lifetime, and the heir becomes entitled by lapse to the moiety of the produce intended for Robert. The purpose of sale for convenience of division still applies to the events which have happened, and this moiety is not land, but personal estate of the heir. Under the third devise, there is the same obvious purpose of sale: first, for a division between the children of Robert, and, failing them, between the heir and Joseph. There were no children of Robert, but the purpose of sale remains, and this moiety also is not land, but personal estate of the heir."

2. If a testator bequeath money to be laid out in a purchase of lands, to be settled to uses which either wholly or partially fail to take effect, the undisposed of interest in the money or estate will result to the testator's executor, upon trust for his next of kin.

The authorities upon the subject appear certainly against the doctrine, but the principle is so clear that scarcely a doubt can be entertained.

In the case of *Fletcher v. Chapman*, affirmed in the

House of Lords (x), a testator had given 1000*l.* to W. G., to the intent it should be laid out in lands, provided the rents thereof should be for his life only. £300 was invested in a purchase of land, but the remaining 700*l.* was still in the shape of money at W. G.'s death. It was held, that the purchased estate should go to the heir of the testator, and that, as the 700*l.* was upon trust to be laid out in land, it should go to the heir in like manner. But this case, it must be observed, was decided at a very early period, and when the doctrine of resulting trusts was very imperfectly understood.

There are to be found some expressions of Lord Cowper which appear to countenance the same notion. "If a sum of money," he says, "should be devised to be laid out in land, and the uses to which the land should go be not declared, if the money thus devised be considered as land, why should not the benefit of that money go to the heir-at-law as a resulting trust?" He then proceeds to observe—"By parity of reason, if a real estate be devised to be sold, and no particular directions be given how the purchase money shall be applied in whole or in part, why should not the money thus disposed of go to the executor to be applied in a course of distribution, or to a residuary legatee of the personal estate, if any such there be? The same law which gives land to the heir, gives personal estate to the executor, or at least to the next of kin, who frequently is not heir. If, then, favour be shewn to the heir with respect to land, which is all that can descend to him as heir, why should not the like favour be shewn to the executor or next of kin with respect to personal

(x) 3 B. P. C. 1.

estate, which they are by right of law equally entitled to?" (y) The latter principle of Lord Cowper seems to be founded on good sense, and therefore, as it is now decided that real estate devised to be sold shall result to the heir, it follows, upon his Lordship's own principle, that money bequeathed to be laid out in lands shall result to the executor.

The case of *Leslie v. The Duke of Devonshire* (z) is a decision to the like purport. E. C. had assigned several sums of money, one of which was the sum of 8,500*l.*, to trustees, upon trust to invest in a purchase of lands; the estates purchased with the 8,500*l.* to be settled, subject to annuities, upon R. C. and his heirs, and the estates purchased with the other sums to be settled to other uses not material to be mentioned; and in the assignment was contained a power of revocation and new appointment by deed or will. E. C. by will, but without declaring whether he meant to revoke the assignment, gave to the same trustees the said sum of 8,500*l.*, and also a mortgage of 6,700*l.* not comprised in the assignment, upon trust for further securing the said annuities, and out of the first annuity that should cease to pay an annuity of 80*l.* to J. L. for life; and, after payment of the said annuities, he willed that the interest of the two mortgage sums of 8,500*l.* and 6,700*l.*, or the rents of the lands to be purchased therewith, should be paid to R. C. for life, and be settled in trust in the same manner as his other estates were directed to be settled. R. C. was the testator's heir, and the question for the Court was, to which set of limitations contained in the assignment the remain-

(y) *Hayford v. Benlows*, Amb. 582.

(z) 2 B. C. C. 187.

der after the life estate of R. C. should be taken to refer, or, in case the devise of it should be held void for uncertainty, to whom it should belong. Sir L. Kenyon said, "I will not decide whether the will was or was not a revocation of the settlement, because, taking it upon the will alone, there is no doubt as to the question. The testator has directed the surplus interest, or the rents of the estate to be purchased, to follow the limitation of his other estates, by which he has shewn that he meant the money to be laid out in land. Then the question is, who is entitled to this, considered as land. That the testator *did not intend* this portion for R. C. I believe, but R. C. stands here in a character favoured by the law: he appears clothed with the character of heir-at-law to the testator. I am bound by a rule which has prevailed in the construction of wills, that, where the Court cannot see its way, the whole property must be considered as undisposed of."

Lord Rosslin appears also on one occasion to have inclined to the same opinion, for, "The next of kin," he said, "claims on two points, in either of which, if he succeeds, he shews a right to it as personal estate, but both of which slide from under him on examination. First he says, there is a clear intention to give the money as land to the *cestuis que trust*. It would follow, that the next of kin could not take. But secondly it is said, the money is directed to be invested in land, which the *cestuis que trust* cannot take for want of precise words giving it to them. The heir at law only has a right to make this objection. How then can the next of kin take, if the heir at law has a right? The claim of the next of kin is the worst claim that ever was set

up (a)." These observations, however, were merely cursory, and not at all material to the determination of the case; it must also be remarked, that if his Lordship did really intend, as the meaning of the passage appears to be, that the heir was entitled, as against the executor, to have the money invested in land for his benefit, he contradicts the opinion expressed by himself in *Walker v. Denne*, that, as between the heir and executor, there was not a *scintilla* of equity to make the property what it was not in fact (b).

It was also remarked by Lord Redesdale, that, "If a testator direct 20,000*l.* to be paid out of the personal estate, and lands to be purchased, on failure of the intended purpose the lands will go to the heir at law: the personal representative cannot take, as the money is converted into land (c)." The authority of Lord Redesdale is undoubtedly entitled to very great attention, but this was a mere *obiter dictum*, and not a deliberate opinion.

To examine the question upon principle, it will be granted, that the heir must take either as *heir* or as *purchaser*. It cannot for a moment be contended, that he can establish a claim in the character of heir, for, to

(a) *Browne v. De Laet*, 4 B. C. C. 534. His Lordship proceeds, "The heir at law contends that the purchases must be made, and, though there are various expressions about the plan and consent of the person in possession of the other estate, yet, as there is no *express disposition*, he must take as heir. It is not necessary to examine how far this proposition applies to any thing that was not land in the testator, and could not descend to the heir." By

the latter words, his Lordship did not mean to doubt whether the heir was entitled to any thing that was not land in the ancestor; but whether, supposing him *prim facie* entitled, the rule, that he should not be disinherited without *express words or necessary implication*, was applicable in respect of lands not descended, but directed to be purchased.

(b) 2 Ves. jun. 176.

(c) *Tregonwell v. Sydenham*, 3 Dow, 207.

assert such a title, he must prove himself to be the heir of the person last seised, and here by the terms of the question the testator had no seisin. "The conversion of the estate," said Lord Northington, "is to be after the testator's death, and, whoever takes under the settlement directed to be made, will take a new-created interest, which never did, and never was intended to vest in the testator, and therefore he cannot take but as purchaser (*d*)."

But if the heir is to claim as purchaser, he must shew that the will contains a bequest to him, either *expressly* or *by implication*. Now, he cannot maintain that any express gift was made in his favour, for the supposition is, that the testator has declared no intention; nor is it easy to discover upon what ground any implied gift can be supported, for, if implied at all, it must be so from something said in the will; but if a testator merely direct 1,000*l.* to be laid out in lands, to be settled on A. for life, the injunction plainly involves nothing more than what is actually expressed. Should a testator devise real estate to be sold, and direct the interest of the proceeds to be paid to A. for life, it is undoubted law, that the remainder of the stock would result to the heir, and is not by implication a bequest to the executor (*e*). It may be said, that a testator is supposed so to favour the heir, that, where money is to be turned into land, a devise to the heir shall be presumed. But where is the maxim to be found, that a testator shall be taken to favour his heir more than his executor? That the *law* favours the heir is readily conceded, but it is only in the character of heir; that is, the law, which invests the heir with the title by which he lays claim to

(*d*) *Robinson v. Knight*, 2 Ed.
159.

(*e*) *Wilson v. Major*, 11 Ves.
205.

the land, will support him in the maintenance of that title, until it appears he has been disinherited, either expressly, or by necessary implication. It was never contended that favour was to be shewn to him in the character of a purchaser. As the trust is executory, and therefore admits a greater latitude of construction, it may be thought, perhaps, that the Court would insert a limitation to the heir, on the ground, that, had the question been put to the testator himself, he would have given a direction to that effect ; but as the heir, except as to lands of which the ancestor was seised, is regarded in the light of a stranger, there seems no more reason why the Court should insert a limitation to the heir, than to any indifferent person. Besides, the argument would have no application to such cases as that of *Leslie v. The Duke of Devonshire*, where, as the uses of the remainder, though void, were expressed, the presumption could not be raised. But though the right of the heir may not appear to rest on any reasonable foundation, it may still be thought incongruous that land should go to the executor. But this difficulty will, on examination, be found totally destitute of weight. The respective rights of the heir and executor are absolutely and immutably fixed at the moment of the intestate's decease : except so far as a person may have disposed of his property by will, what was then real estate will descend upon the heir, and what was then personal estate will devolve on the executor. The real estate may, in the execution of some partial purpose expressed upon the will, have been converted into money, or a part of the personal estate may, with the same view, have been converted into realty ; but, in either case, the undisposed of interest will, notwithstanding the conversion, result to

that representative from whom in fact it was never aliened. If a testator direct the sale of an estate, and give one-third of the proceeds to A., and another to B., the remaining third is, even after the actual sale, a portion of the land of which the ancestor was seised, and will therefore result to the heir; and, on the same principle, if 1,000*l.* be bequeathed to be laid out in lands to be settled, one-third on A. and his heirs, and another on B. and his heirs, the remaining one-third, even after the investment, must be part of the testator's personal estate, and, as such, result to the executor. "All the cases," said Lord Eldon, "establish this proposition, that where a person, dealing upon his own property, has directed a conversion for a *particular purpose*, or *out and out but the proceeds to be applied to a particular purpose*, when the purpose fails, the intention fails, and the Court regards him as not having directed the conversion (*f*)."
It may appear singular, that money should go to the heir, and land to the executor, but it is needless to mention the numerous cases in which money at law is land in equity, and what is land at law is regarded as money in equity.

On the whole, therefore, it is submitted, that, as the cases of *Fletcher v. Chapman*, and *Leslie v. The Duke of Devonshire*, were decided, not on a weak, but, it may almost be said, upon no principle, their authority, should the question again come before the Court, would not be followed.

The recent case of *Cogan v. Stevens* (*g*) at the Rolls, before Sir C. Pepys, has lately decided the point in favour of the executor.

(*f*) *Ripley v. Waterworth*, 7 Ves. 435.

(*g*) Append. No. 2.

3. It often happens, that the settlor makes a primary disposition of the *whole* property to A. subject to a particular charge in favour of B., and the charge in event either wholly or partially fails so as either not to divest, or only *pro tanto* divest the estate of A. The reader must distinguish the preceding cases of resulting trust from such a gift as this; for here, as the entirety is disposed of in the first instance to A. so far as the charge does not exhaust it, there can nothing result to the heir, even should the charge not take effect. The distinction was thus stated by Sir J. Leach: "If the devise," he said, "to a particular person, or for a particular purpose, be intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be entitled to the benefit of the failure (*h*)."

Thus, if lands be devised to A. charged with a legacy to B. provided B. attain the age of twenty-one, should B. attain that age he will be entitled to the legacy, but if he die without attaining that age, the devise has become absolute in A., and the will is to be read as if the legacy to B. had never been mentioned (*i*).

The construction is the same, if lands be given to A. subject to and charged with any sum not exceeding 10,000*l.* to such persons, and in such manner, as the testator shall appoint, and the power is either never exercised, or the execution of it is void (*k*): for here, as

(*h*) *Cooke v. The Stationers' Company*, 3 M. & K. 264. *Barley*, 3 P. W. 20, should have been decided the same way, but

(*i*) *Tregonwell v. Sydenham*, 3 Dow, 210, *per* Lord Eldon. *Sprigg v. Sprigg*, 2 Vern. 394, was decided on this principle; *Cruse v* the point was not noticed. (*k*) *Jackson v. Hurlock*, 2 Ed. 263; *Cooke v. The Stationers' Company*, 3 M. & K. 262.

the testator confers the whole interest on the devisee, reserving the power, if he either abstain from executing the power, or appoint for an illegal purpose, he does not diminish that interest, but the heir is wholly disinherited (*l*).

And where a testator had devised certain estates upon trust to sell, and out of the proceeds to pay 5,000*l.* unto his wife, her executors and administrators, *in part satisfaction of the sum of 10,000*l.* secured to her by marriage settlement in case of her surviving him*, and to invest the residue upon certain trusts, and the wife died in the lifetime of the husband so that the 10,000*l.* never became raisable, it was held that the 5,000*l.*, instead of resulting to the heir, was included in the residue (*m*). The construction put upon the will was, that the whole fund was in the first instance given to the residuary legatees, subject to a charge of 5,000*l.* to arise on a certain event, and that contingency having never occurred, the primary devise of the entirety never became divested (*n*).

Again, if an estate be settled to the use of trustees for a term of ninety-nine years, upon trusts that do not exhaust the whole interest, and from and after the expiration, or other sooner determination of the said term, and *subject thereto*, to uses in strict settlement, the surplus of the term will be in trust, not for the heir, but for the devisees in remainder, for here the intention is express, that, subject to trusts which have been exhausted, the remaindermen shall take the whole estate (*o*).

And if the limitation be to trustees for ninety-nine years

(*l*) *Tregonwell v. Sydenham*, 3 Dow, 213, *per* Lord Eldon. decided on this ground, see Ch. Bar. Richards's Observations, Dan. 235,

(*m*) *Noel v. Lord Henley*, 7 Price, 241; *S. C.* Dan. 211 & and Lord Eldon's, Id. 338.

(*o*) *Davidson v. Foley*, 2 B. C. C. 203; and see *Maundrell v. Maundrell*, 10 Ves. 259.

(*n*) That the case was probably

upon the trusts thereafter expressed, (and the instrument makes no mention of the trusts,) and from and after the expiration, or other sooner determination of the said term, to uses in strict settlement, the Court will consider the intention to be clearly *implied*, that the remaindermen should have the beneficial enjoyment in the first instance, and will read the will as if the words *subject thereto and to the trusts thereof* had been actually expressed (*p*).

But if lands be given to A., on *condition* that he pay 10*l.* to a charity, the void legacy will, it seems, in this case be a resulting trust to the heir (*q*); for the specific sum is excepted out of the devise, and, there being no declaration of intention, either express or implied, as to any legal disposition of it, the interest has not been effectually devised away, and therefore results to the heir (*r*).

And if an estate be settled to the use of A. and B. for a term of sixty years for raising 20,000*l.* to be applied in charity, and, after the said sum of 20,000*l.* shall have been raised or determination of the said term, to uses in strict settlement, the term, being excepted from the devise to the remaindermen to the extent of 20,000*l.*, will, to the amount of that sum, result in favour of the settlor's heir (*s*).

(*p*) *Sidney v. Shelley*, 19 Ves. 352; *S. C.* Coop. 206; overruling the *dictum* of Lord Hardwicke, in *Brown v. Jones*, 1 Atk. 191.

(*q*) *Bland v. Wilkins*, cited in note to *Wright v. Row*, 1 B. C. C. 61; compare *Arnold v. Chapman*, 1 Ves. 108, and *Gravenor v. Hallum*, Amb. 643, with *Tregonwell v. Sydenham*, 3 Dow, 209 & 212: see *contra*, *Barrington v. Hereford*, cited in *Wright v. Row*, 1 B. C. C.

61; *Baker v. Hall*, 12 Ves. 497; but the latter case was decided, the heir not being a party; and see *Kennell v. Abbott*, 4 Ves. 811.

(*r*) See Lord Eldon's Observations on *Gravenor v. Hallum* in *Tregonwell v. Sydenham*, 3 Dow, 212.

(*s*) *Tregonwell v. Sydenham*, 3 Dow, 194; and see *Levet v. Needham*, 2 Vern. 138.

4. It has been stated in general terms, that, in the cases we have mentioned, a trust will result to the *settlor or his representative*, but the doctrine must be received with at least this qualification, that the interest which would have resulted is not otherwise disposed of by the settlor himself.

Any interest that would have resulted may of course be given away from the settlor's representative, by a *particular* and *specific* devise or bequest; it remains only to inquire what is the effect of certain *general* expressions.

With respect to a testator's realty, the heir "shall sit in the seat of his ancestor," unless the disinheritance be expressed or clearly implied. The word "residue," therefore, has in devises received a strict and narrow construction, and is held to mean, not all that the testator has not actually disposed of, but only so much of which he has shewn no intention of disposing. Thus, if lands be devised upon trust to raise 5,000*l.* for a charity, the residue to A. (*t*), or upon trust to raise 5,000*l.*, with a general devise "of all the residue of the testator's real estate, whatsoever and wheresoever (*u*),"

(*t*) *Hutcheson v. Hammond*, 3 B. C. C. 128; *Page v. Leapingwell*, 18 Ves. 463; *Collins v. Wakeman*, 2 Ves. jun. 683; *Cruse v. Barley*, 3 P. W. 20; *Jones v. Mitchell*, 1 S. & S. 293; *Sprigg v. Sprigg*, 2 Vern. 394, *per cur.*; *Cooke v. Stationers' Company*, 3 M. & K. 264, *per cur.*

(*u*) *Goodright v. Opie*, 8 Mod. 123; *Wright v. Hall*, Fort. 182;

S. C. 8 Mod. 222; *Roe v. Fludd*, Fort. 184; *Watson v. Earl of Lincoln*, Amb. 325; *Oke v. Heath*, 1 Ves. 141, *per* Lord Hardwicke; *Cambridge v. Rous*, 8 Ves. 25, *per* Sir W. Grant; *Doe v. Underdown*, Willes. 293. But see *Page v. Leapingwell*, 18 Ves. 463; but it does not appear that the heir was a party, and the question was not discussed.

in either case the void legacy will result to the heir, and not be included in the residuary clause.

And if a testator direct his lands to be sold, and afterwards add a general bequest of all his *personal estate* (*x*), or appoint a person *residuary executor* (*y*), any part of the proceeds of the sale that is undisposed of by the will, and *a fortiori* that is disposed of by the will but undisposed of in event, as a legacy failing by lapse, will not form part of the residuary fund in the first case, or pass to the residuary executor in the second; for nothing, properly speaking, is a testator's *personal estate*, but what possesses that character at the moment of his decease (*z*).

But the intention of converting the property absolutely by the sale, so as to make the proceeds undisposed of by the will pass by the description of the testator's "personal estate," may be collected from a will specially worded (*a*); and the blending of the real and personal estates into one fund will be regarded as a circumstance in some degree indicative of such an intention (*b*); and this of course will be the case, where the testator expressly directs the proceeds to be considered as part of his personalty (*c*).

(*x*) *Maugham v. Mason*, 1 V. & B. 410; and see *Gibbs v. Rumsey*, 2 V. & B. 294.

(*y*) *Berry v. Usher*, 11 Ves. 87.

(*z*) See *Maugham v. Mason*, 1 V. & B. 416.

(*a*) *Mallabar v. Mallabar*, Rep. t. Talb. 78; *Brown v. Bigg*, 7 Ves. 279; *Durour v. Motteux*, 1 Ves. 321; (see Motteux's will correctly stated, *Jones v. Mitchell*, 1 S. & S. 292, note (d).) See observations on *Mallabar v. Mallabar*, and *Durour v. Motteux*, in *Maugham v. Mason*, 1 V. & B. 416.

(*b*) Compare *Durour v. Motteux*, 1 Ves. 321, with *Maugham v. Mason*, 1 V. & B. 417; *Hutcheson v. Hammond*, 3 B. C. C. 148, per Lord Thurlow; but see *Berry v. Usher*, 11 Ves. 87.

(*c*) *Kidney v. Koussmaker*, 1 Ves. jun. 436; see *Lowe v. Hackward*, 18 Ves. 171. In *Collins v. Wake-man*, 2 Ves. jun. 683, the sum undisposed of did not fall into the residue on the principle adopted in *Davers v. Dewes*, 3 P. W. 40, and *Attorney-General v. Johnstone*, Amb. 577.

The question has lately been much discussed, what expressions of a testator will amount to such an absolute conversion of real estate into personal, that a void or lapsed legacy given out of the proceeds of the sale shall, as if the property had been personal, fall into the residuary bequest, instead of resulting to the heir. "I agree," said Lord Brougham, "a testator may provide that lapsed and void legacies shall go in this manner, as if the testator say in express words, 'I give all lapsed and void legacies as parcel of my residue to the residuary legatee,' and if he can do it by express words, he can do it by plain and obvious intention to be gathered from the whole instrument (*d*)."¹ But what will amount to such an implication is a point that, from a review of the cases, can with difficulty be brought under any very definitive rule.

In *Durour v. Motteux* (*e*) a testator gave all his estate, freehold and leasehold, monies, securities, bonds, stocks, debts, both at home and abroad, household goods, plate, jewels, linen, wearing apparel, and all he had or might have or claim to, of what kind soever, or wheresoever, upon trust to sell and dispose of all his freeholds, leaseholds, monies, &c., (repeating the words at length,) and after payment of all his debts, funeral expenses, and legacies, to put or place out *all the residue of his personal estate* at interest upon government or other securities, upon trust to pay the interest thereof to several persons for their

(*d*) *Amphlett v. Parke*, 2 R. & M. 232.

(*e*) 1 Ves. 321. (See the will stated from R. L. in *Jones v. Mitchell*, 1 S. & S. 292, note (*d*).) *Mallabar v. Mallabar*, Rep. t. Talb. 78, has been repeatedly cited to the same purpose, but does not at all

bear upon the subject. There was no lapsed or void legacy, but the question was, whether the proceeds of the sale should, from the intention to be gathered from the will, pass by a residuary bequest of all the testator's "personal estate?" See *Phillips v. Phillips*, 1 M. & K. 660.

lives, and, after the decease of the longest liver of them, to pay and apply *the said residue and the principal*, or, as he afterwards varied the phrase, *the principal of the residue of his estate*, to the children of the several persons in the said will mentioned. One of the legacies was void by the statute of mortmain, and Lord Hardwicke was of opinion the money to arise by sale of the real estate was converted absolutely into personalty, it plainly appearing that by the description of *all his personal estate* he meant to include the whole in the residue ; that the money was to be considered now as personalty, and the void legacy was therefore to be included in the residuary bequest.

In *Kennell v. Abbott* (*f*) a testatrix gave a copyhold estate to A. and his heirs upon trust to sell, and out of the proceeds to pay certain legacies, and, amongst others, 150*l.* to B. The testatrix then gave all her household goods, plate, furniture, and stock in husbandry to A. his executors and administrators in trust to sell, and out of the proceeds to renew a lease, and as to the residue of the purchase money to arise from the sale of the copyhold estate, household goods, furniture, and all the rest, residue, and remainder of her monies, securities for money, personal estate, and effects whatsoever and wheresoever that she should die possessed of, interested in, or entitled to, or whereof she had power to dispose by will, she gave the same to C. The legacy to B. having failed, Lord Alvanley was of opinion, that the will had made the real estate to all intents and purposes personal ; that the estate was turned entirely into money, and the testatrix had contemplated it as such ; that, taking a retrospective

(*f*) 4 Ves. 802.

view of what she had done, and meaning to give every thing not disposed of, she had added this residuary clause, and therefore not only what had not been expressly devised, but every thing lapsed, or by any means not disposed of, was to form part of the residue.

The question slept after this till it was again agitated, before Sir John Leach, in *Amphlett v. Parke* (g). A testatrix had given and devised certain freehold and copyhold estates to A. and his heirs upon trust to sell, and directed the monies to arise from such sale "*to be considered and taken to be part of the personal estate,*" and she willed and directed that out of "*the monies to arise from such sale, and out of all other the personal estate,*" the several legacies thereafter mentioned should be paid, and "*all the residue of her personal estate, and of the monies arising from the sale of her real estate,*" she gave to B. Some of the legacies having lapsed, the heir-at-law and the residuary legatee put in their respective claims. Sir J. Leach said, that, in deference to the two cases of *Durour v. Motteux* and *Mallabar v. Mallabar* (h), he must consider the testatrix to have had in her view the improbable intention, that the proceeds of the sale should, for purposes not foreseen by her, have the same qualities as if at her death they had been part of her personal estate, and therefore his Honor decided that the lapsed legacies were included in the residue. The parties having differed in drawing up the minutes, the case was re-argued before Sir J. Leach, who decided as before in favour of the residuary legatee (i).

(g) 1 Sim. 275.

1 M. & K. 660.

(h) His Honor afterwards admitted the latter case had no application. See *Phillips v. Phillips*,

(i) *Amphlett v. Parke*, 4 Russ. 75.

The point arose a second time before Sir J. Leach, in *Green v. Jackson* (k). A testator had given all his personal estate and effects to A., B., and C., their executors or administrators, upon trust to pay certain legacies, and the testator devised all his real estate, whatsoever and wheresoever situate, unto the said A., B., and C., their heirs and assigns, upon trust to sell and dispose of the same for the best price or prices that could reasonably be gotten; and it was the testator's will and mind, that all the monies to be received by sale of the said real estates, and by virtue of the bequest of his said personalty, and all other the monies which should come to their hands, should be by the same trustees placed in one of the banking houses in Hull, till the whole could be collected and got in; and after the amount of such money should be ascertained, and the same lodged at interest in the said bank, the testator directed that his said trustees should, on the death or marriage again of his wife, pay certain charitable legacies, which were void by the statute of mortmain, and pay and apply all the residue of the monies which should be then in their hands unto and among the children of the several persons therein mentioned. Sir John Leach said, the case of *Durour v. Motteux* was precisely in point, and, upon the authority of that case as well as upon principle, his opinion was, that the failure of the charitable legacies enured for the benefit of the residuary legatee, and that no distinction could be made between that part of the residue which had arisen from the real estate, and that part which had arisen from the personal estate.

Amphlett v. Parke was heard on appeal before Lord

(k) 5 Russ. 35.

Brougham, who, after giving great attention to the subject, at length reversed his Honor's decision, at the same time, however, expressing a desire, that the point should be finally determined on appeal to the House of Lords (*l*). *Green v. Jackson*, which had also been appealed against, came on before his Lordship a short time after; but as the appeal in *Amphlett v. Parke* was still pending in the House of Lords, his Lordship declined to pronounce judgment until the result of that appeal should be known.

The heir and residuary legatee in *Amphlett v. Parke* afterwards compromised the matter by dividing the fund; but, before the appeal in *Green v. Jackson* could finally be disposed of, Lord Brougham had resigned the great seal, and the case was eventually heard before his successor Lord Lyndhurst. His Lordship affirmed Sir John Leach's decree, on the ground that, *taking the whole will together*, the testator intended to treat the mixed fund composed of the proceeds of the sale and the personal estate as personalty (*m*).

No other conclusion can apparently be drawn from the cases than this, that a lapsed or void legacy will pass to the residuary legatee, if either the testator *expressly* declare that the proceeds of the sale shall be considered as "personal estate," or if the intention of an absolute conversion into personal estate can, without the aid of any particular expression to that effect, be gathered from the *general structure* of the will. It was stated in a former page, that if a testator expressly direct the proceeds of the sale to be taken as "personal estate," a part of the proceeds undisposed of by him will nevertheless not result to the *next of kin*. The distinction between

(*l*) 2 R. & M. 221.

(*m*) 2 R. & M. 238.

the *next of kin* and the *residuary legatee* is this: the former claim *dehors* the will, while the latter is a claimant *under* the will, and when the proceeds of the sale are directed to be taken as personalty, the testator must be understood to mean for the purposes of the will only, and not for any object beyond it.

With respect to resulting trusts of *personal* estate, the next of kin are regarded in a very different light from the testator's heir-at-law. The general residuary bequest sweeps every interest, whether undisposed of by the will, or undisposed of in event, and therefore it is only where the will contains no residuary clause, that the next of kin can assert a claim to the benefit of the resulting interest (*n*). But if any part of the personal estate be expressly exempted from the residue, as if a testator reserve a sum to be disposed of by a codicil, and give the residue to A., and no codicil is executed, the sum so specially excepted will then result to the next of kin (*o*).

5. Lastly, it may be noticed, that settlements to *charitable* purposes are an exception from the law of resulting trusts; for, upon the construction of instruments of this kind, the Court has adopted the two following rules:—

1. That where a person makes a gift, whether by deed or will, and expresses a general intention of charity, but either particularizes no objects (*p*), or such as do not

(*n*) See *Dawson v. Clarke*, 15 Ves. 417; *Brown v. Higgs*, 4 Ves. 708; *S. C.* 8 Ves. 570; *Shanley v. Baker*, 4 Ves. 732; *Jackson v. Kelly*, 2 Ves. 285; *Oke v. Heath*, 1 Ves. 141; *Cambridge v. Rous*, 8 Ves. 25; *Cooke v. Stationers' Company*, 3 M. & K. 264.
 (*o*) *Davers v. Dewes*, 3 P. W. 40; *Attorney-General v. Johnstone*, Amb. 577.
 (*p*) *Attorney-General v. Her- rick*, Amb. 712.

exhaust the proceeds (*q*), the Court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representatives, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied.

2. That where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the whole proceeds, but, in consequence of an increase in the value of the estate, an excess of income subsequently arises, the Court will order the surplus, instead of resulting to the heir, to be applied in the same or a similar manner with the original amount (*r*).

But, even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but, noticing the property to be of a certain value, appropriate part only to the charity, the residue will then follow the general rule, and result to the heir-at-law (*s*).

(*q*) *Attorney-General v. Haberdashers' Company*, 4 B. C. C. 102; *S. C.* 2 Ves. jun. 1; *Attorney-General v. Arnold*, Shower's P. C. 22; and see *Attorney-General v. Sparks*, Amb. 201; and see Lord Eldon's observations, *Attorney-General v. Mayor of Bristol*, 2 J. & W. 319.

(*r*) *Inhabitants of Eltham v. Warreyn*, Duke, 67; *Sutton Colefield case*, second resolution, Id. 68; *Hynshaw v. Morpeth Corporation*, Id. 69; *Thetford School case*, 8 Re. 130 b; *Attorney-General v. Johnson*, Amb. 190; *Kensington Hastings' case*, Duke, 71;

Attorney-General v. Mayor of Corentry, 2 Vern, 397, reversed in D. P. 7 B. P. C. 236; (see the foregoing cases commented upon by Lord Eldon in *Attorney-General v. Mayor of Bristol*, 2 J. & W. 316); *Attorney-General v. Coopers' Company*, 19 Ves. 189, per Lord Eldon; *Attorney-General v. Wilson*, 3 M. & K. 362; *Attorney-General v. Master of Catherine Hall, Cambridge*, Jac. 381.

(*s*) See *Attorney-General v. Mayor of Bristol*, 2 J. & W. 307 & 332; *Attorney-General v. Gascoigne*, 2 M. & K. 647.

The exceptions we have noticed were established at an early period, when the doctrine of resulting trusts was imperfectly understood (*t*). The interest of the heir was shut entirely out of sight, and the question was viewed as between the charity and the trustee (*u*). Were the subject still unprejudiced by authority, there is little doubt but the Court would, at the present day, be governed by the general principle (*x*).

II. The next kind of trust we have to consider is, where a trust already in existence is created *de novo*, by operation of law, as against this particular property.

A trust of this kind arises wherever the estate is converted by the trustee from one species of property into another; for if the property, in its original form, was invested with a trust, the *cestui que trust's* interest cannot be affected by any change of that form; and whether the conversion be in pursuance or in breach of the trustee's duty, is immaterial; for an abuse of trust cannot confer any right on the party abusing it, or on those who claim in privity with him (*y*). Thus, where a factor was employed to sell cloth, and he sold the article upon credit, and died before receipt of the money, it was held the specialty creditors of the factor had no claim to the debt as assets, but it belonged, in equity, to the factor's employer (*z*).

(*t*) *Attorney-General v. Johnson*, Amb. 190, *per* Lord Hardwicke; *Attorney-General v. Mayor of Bristol*, 2 J. & W. 307, *per* Lord Eldon.

(*u*) See *Thetford School case*, 8 Re. 130.

(*x*) See *Attorney-General v. Mayor of Bristol*, 2 J. & W. 307.

(*y*) *Taylor v. Plumer*, 3 M. & S. 570, *per* Lord Ellenborough.

(*z*) *Burdett v. Willet*, 2 Vern. 638.

It was said, indeed, by Lord King, that *money* has no ear-mark, insomuch that, if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realise all his testator's estate, and afterwards die insolvent, yet a Court of Equity could not charge the land (a). But the expression, *money has no ear-mark*, seems to be a maxim of law, that, being the currency of the country, it carries the legal right of property with it, and cannot be followed by the true owner into the hands of a person to whom it has passed in a due course of circulation (b); not that, if a trustee be the depositary of money, a Court of Equity cannot take notice in what manner he disposes of it. Thus in *Lord Chadworth v. Edwards* (c) the steward, instead of accounting for the rents to Lord Chadworth, remitted them to a banker in London in his own name, and had them invested in stock also in his own name; and Lord Chadworth, on evidence of the purchases having been made from the profits of the estate, was allowed to obtain an injunction to restrain a transfer of the stock. And so, in numerous instances where the trust fund has been realised, the land, which has been substituted for the money, has been held bound by the same equity to which the money laid out in the purchase was subject (d).

(a) *Deg v. Deg*, 2 P. W. 414; and see *Cox v. Bateman*, 2 Ves. 19; *Waite v. Whorwood*, 2 Atk. 159.

(b) See *Miller v. Race*, 1 Bur. 457; *Taylor v. Plumer*, 3 M. & S. 575.

(c) 8 Ves. 46; and see *Ex parte Chion*, cited *Godfrey v. Furzo*, 3 P. W. 187, note (A).

(d) *Ryall v. Ryall*, 1 Atk. 59; *S. C. Amb.* 413; *Balgney v. Hamilton*, Id. 414; *Lane v. Deighton*, Id. 409; *Anon. case*, Sel. Ch. Cas. 57; *Lench v. Lench*, 10 Ves. 517, per Sir W. Grant; and see *Earl of Plymouth v. Hickman*, 2 Vern. 167. In the following cases the money was not followed, on

Bills and *notes*, which are negotiable by the custom of trade, and partake of the nature of currency, have also been said to have no ear-mark; but undoubtedly a Court of Equity may follow them in the same manner as money. Thus, where bills were remitted to a steward, who first exchanged them for paper, and then laid out the paper in a purchase of land, Lord Hardwicke held that the estate, as the substitute for the original property, was bound by the same equitable rights (*e*). Even where bills have been *negotiated*, the person who discounted them with actual notice of the trust cannot protect himself in equity (*f*).

To this head of trusts must also be referred the rule, that if a trustee (*g*), or other person invested with a fiduciary character, as a mortgagee (*h*), tenant for life (*i*), partner in a business (*k*), joint-tenant (*l*), or devisee

account of the Statute of Frauds: *Kirk v. Webb*, Pr. Ch. 84; *Heron v. Heron*, Id. 163; *Halcott v. Markant*, Id. 168; *Kinder v. Miller*, Id. 172; *S. C.* 2 Vern. 440; *Hooper v. Eyles*, Id. 480.

(*e*) *Bennet v. Mayhew*, cited in *Pulteney v. Darlington*, 1 B. C. C. 232, and in *Cator v. Earl of Pembroke*, 2 B. C. C. 287; and see *Ex parte Sayers*, 5 Ves. 169.

(*f*) *Verney v. Carding*, cited *Joy v. Campbell*, 1 Sch. & Lef. 345.

(*g*) *Holt v. Holt*, 1 Ch. Ca. 191; *Pierson v. Shore*, 1 Atk. 480; *Fitzgibbon v. Scanlan*, 1 Dow, 261; *Abney v. Miller*, 2 Atk. 597, per Lord Hardwicke; *Edwards v. Lewis*, 3 Atk. 538; *Killick v. Flexney*, 4 B. C. C. 161; *Rawe*

v. Chichester, Amb. 715; *Keech v. Sandford*, Sel. Cas. Ch. 61; *Griffin v. Griffin*, 1 Sch. & Lef. 352.

(*h*) *Rushworth's case*, Freem. 13.

(*i*) *Brookman v. Hales*, 2 V. & B. 45; *Taster v. Marriott*, Amb. 668; *Rawe v. Chichester*, Id. 715; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Lawrence v. Maggs*, 1 Ed. 453; *Owen v. Williams*, Amb. 734; *Pickering v. Vowles*, 1 B. C. C. 197; *James v. Dean*, 11 Ves. 383; *S. C.* 15 Id. 236.

(*k*) *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Bowles v. Stewart*, 1 Sch. & Lef. 209.

(*l*) *Winslow v. Tighe*, 2 B. & B. 195.

subject to an annuity (*m*), renew a lease in his own name, and at his own expense, the trust that was annexed to the original term will attach upon the interest that is substituted in its place. And even if the old lease had expired at the time the new lease was granted, yet as the mere tenant-right of renewal is regarded by equity in the light of an actual *estate*, the interest obtained by means of that tenant-right will be considered *pro tanto* an ingraftment upon it, and as such will be subjected to the trusts of the original term (*n*). The only concession to the trustee is to stand as creditor upon the estate for the amount of the expenses incurred (*o*).

But in all the cases upon this subject, the trustee has either obtained a renewal of the lease by being in possession, or it was done behind the back or in fraud of those who were interested in the original lease, or there was either a remnant of the old lease, or a tenant-right of renewal on which the new lease could be ingrafted (*p*); and therefore, in the absence of all these grounds, as where the tenant-right has been forfeited, &c., the trustee may retain the renewed lease for his individual benefit (*q*).

If the trustee of a lease become the *purchaser of the reversion*, Sir W. Grant said, that, as he thereby intercepts and cuts off the chance of future renewals, and consequently makes use of his situation to prejudice the interests of those who stand behind him, there might be some sort of equity in a claim to have the reversion con-

(*m*) *Winslow v. Tighe*, 2 B. & B. Ed. 453.

195.

(*p*) *Nesbitt v. Tredennick*, 1 B.

(*n*) See *James v. Dean*, 11 Ves. & B. 47, *per* Lord Manners.

391.

(*q*) *Nesbitt v. Tredennick*, 1 B.

(*o*) See *Lawrence v. Maggs*, 1 & B. 29.

sidered as a substitution for those interests, but his Honour was not aware of any determination to that effect (r).

But where a lease had been held of a college, and, the corporation having disposed of the reversion to a stranger, the trustee purchased of the alienee, his Honour expressly decided that the parties interested in the original lease had no equity against the trustee, for the tenant-right of renewal with a public body was gone, and a lease at a rack-rent was all that could be expected from a private proprietor (s).

III. The last kind of trust we have to consider is, where a trust already in existence and annexed to the present subject matter is created *de novo* by operation of law as against this particular person.

A trust attaches in this manner wherever the property passes from the trustee into the hands of a person who takes by a title derivative from the trustee; as, if the trustee die, the heir, executor, or administrator, becomes the legal owner of the property, but, as he merely represents the ancestor, testator, or intestate, he takes it in the same character, and is therefore bound by the same equity.

So, if a trustee devise the estate, the devisee, as an assign, will be invested with the character of a trustee (t).

If the estate be passed to a stranger by conveyance, then the grantee, if he be a *volunteer*, will be bound by

(r) *Randall v. Russell*, 3 Mer. 197; and see *Hardman v. Johnson*, 1b. 347; *Norris v. Neve*, 3 Atk. 37 & 38; *Lesley's case*, 2 Freem. 52; *Fosbrooke v. Balguy*, 1 M. & K. 226.

(s) *Randall v. Russell*, 3 Mer. 190.

(t) *Marlow v. Smith*, 2 P. W. 201, per Sir J. Jekyll; *Lord Grenville v. Blyth*, 16 Ves. 231, per Sir W. Grant.

the trust, whether he had notice of it (*u*) or not (*x*), for, though he had no actual notice of the equity, yet the Court will presume it against him, where he paid no consideration. But, if the grantee be a *purchaser* of the estate at its full value, then, if he take with *notice* of the trust, he is bound to the same extent and in the same manner as the person of whom he purchased (*y*), even though the conveyance was made to him by fine with non-claim (*z*), for, knowing another's right to the property, he throws away his money voluntarily, and of his own free will (*a*); and the rule applies not only to the case of a trust, properly so called, but to purchasers with notice of any equitable incumbrance, as of a covenant or agreement affecting the estate (*b*), or a *lien* for purchase

(*u*) *Mansell v. Mansell*, 2 P. W. 678; *Saunders v. Dehew*, 2 Vern. 271; *S. C.* 2 Freem. 123; *Langton v. Astrey*, 2 Ch. Re. 30; *S. C.* Nels. 126.

(*x*) *Mansell v. Mansell*, 2 P. W. 681, *per cur.*; *Pye v. George*, 2 Salk. 680, *per* Lord Harcourt; and see 1 Re. 122. b.; *Burgess v. Wheate*, 1 Ed. 219; *Spurgeon v. Collier*, 1 Ed. 55; *Cole v. Moore*, Mo. 806.

(*y*) *Dunbar v. Tredennick*, 2 B. & B. 319, *per* Lord Manners; *Pawlett v. Attorney-General*, Hard. 469, *per* Lord Hale; *Burgess v. Wheate*, 1 Ed. 195, *per* Sir T. Clarke; *Bovey v. Smith*, 1 Vern. 149; *Phayre v. Peree*, 3 Dow, 129; *Adair v. Shaw*, 1 Sch. & Lef. 262, *per* Lord Redesdale; *Wigg v. Wigg*, 1 Atk. 382; *Mead v. Lord*

Orrery, 3 Atk. 238, *per* Lord Hardwicke; *Mackreth v. Symmons*, 15 Ves. 350, *per* Lord Eldon; *Mansell v. Mansell*, 2 P. W. 681, *per cur.*; *Willoughby v. Willoughby*, 1 T. R. 771, *per* Lord Hardwicke; *Verney v. Carding*, cited *Joy v. Campbell*, 1 Sch. & Lef. 345; *Flemming v. Page*, Rep. t. Finch, 320; *Powell v. Price*, 2 P. W. 539, admitted; *Backhouse v. Middleton*, 1 Ch. Ca. 173; *S. C.* Id. 208.

(*z*) *Kennedy v. Daly*, 1 Sch. & Lef. 355.

(*a*) *Mead v. Lord Orrery*, 3 Atk. 238, *per* Lord Hardwicke.

(*b*) *Daniels v. Davison*, 16 Ves. 249; *Earl Brook v. Bulkeley*, 2 Ves. 498; *Taylor v. Stibbert*, 2 Ves. jun. 437; *Winged v. Lefebury*, 2 Eq. Ca. Ab. 32; *Ferrars*

money (*c*). But, if a *bonâ fide* purchaser have *not notice*, he then merits the full protection of the Court, and his title, even in equity, cannot be impeached (*d*).

If a purchaser had no notice of a trust at the time of the purchase, but afterwards discovers a trust, and obtains a conveyance from the trustee, it seems he cannot protect himself by taking shelter under the legal estate; for notice of the trust converts him into a trustee, and he must not, to get a plank to save himself, be guilty of a breach of trust (*e*). A purchaser without notice from a purchaser with notice is not liable, for his own *bona fides* is a good defence in itself, and the *mala fides* of the vendor ought not to invalidate it (*f*). But an exception must be made in the case of a charitable use, for it has been ruled that a purchaser without notice from a purchaser with notice shall be bound by the claim of the charity (*g*).

v. Cherry, 2 Vern. 384; *Jackson's case*, Lane, 60; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Kennedy v. Daly*, 1 Sch. & Lef. 355.

(*c*) *Mackreth v. Symmons*, 15 Ves. 329; *Walker v. Preswick*, 2 Ves. 622, *per* Lord Hardwicke; *Kator v. Pembroke*, 1 B. C. C. 302, *per* Lord Loughborough; *Gibbons v. Baddall*, 2 Eq. Ca. Ab. 682, note (*b*); *Elliot v. Edwards*, 3 B. & P. 181; and see *Grant v. Mills*, 2 V. & B. 306; *Dunbar v. Tredennick*, 2 B. & B. 320.

(*d*) *Burgess v. Wheate*, 1 Ed. 195, *per* Sir T. Clarke; *Id.* 246, *per* Lord Henley; *Millard's case*, 2 Freem. 43; *Mansell v. Mansell*, 2 P. W. 681, *per cur.*; *Willoughby v. Willoughby*, 1 T. R. 771, *per*

Lord Hardwicke; *Dunbar v. Tredennick*, 2 B. & B. 318, *per* Lord Mannors; *Trevor v. Trevor*, 1 P. W. 633; *Harding v. Hardrett*, Rep. t. Finch, 9; *Cole v. Moore*, Mo. 806, *per cur.*

(*e*) *Saunders v. Dehew*, 2 Vern. 271; *S. C.* 2 Freem. 123; *Langton v. Astrey*, 2 Ch. Re. 30; *S. C.* Nels. 126.

(*f*) *Mertins v. Jolliffe*, Amb. 313, *per* Lord Hardwicke; *Ferrars v. Cherry*, 2 Vern. 384; see *Pitts v. Edelfph*, Tothill, 164; *Salsbury v. Bagott*, 2 Sw. 608, *per cur.*

(*g*) *East Greensted's case*, Duke, 65; *Sutton Colefield case*, *Id.* 68; and see *Id.* 94, 173.

A purchaser with notice from a purchaser without notice is exempt from the trust, not from the merits of the second purchaser, but of the first; and also on the ground that, if an innocent purchaser were prevented from disposing of the beneficial interest, the necessary result would be a stagnation of property (*h*). But, if the trustee sell the lands to a *bond fide* purchaser without notice, and afterwards *himself* become the owner of the lands, though for a good and valuable consideration, the trust as to him revives again, and he shall restore the land to the trust (*i*); and in this respect equity follows the law, for, if a trespasser of goods sell them in market overt the owner's title is barred, but, if they come to the trespasser again, the owner may seize them (*k*).

Upon the question, how far a purchaser will be bound by notice of a *doubtful equity*, Lord Camden said, "A man must take notice of a deed on which *an equity, supported by precedents the justice of which every one acknowledges, arises, but not the mere construction of words, which are uncertain in themselves, and the meaning of which often depends on their locality*" (*l*). And Sir W. Grant observed, "There may be such a *doubtful equity* that a purchaser is not to be taken to know what will be the decision, and that

(*h*) *Harrison v. Forth*, Pr. Ch. 51; *Bradwell v. Catchpole*, stated note (*a*); *Mertins v. Jolliffe*, Amb. 313, per Lord Hardwicke; *Brandlyn v. Ord*, 1 Atk. 571, per eundem; *Sweet v. Southcote*, 2 B. C. C. 66; *M'Queen v. Farquhar*, 11 Ves. 478, per Lord Eldon; *Lowther v. Carlton*, 2 Atk. 242; *S. C.* 3 Barn. 358; *S. C.* For. 187; *Andrew v. Wrigley*, 4 B. C. C. 136, per M. R.; *Salsbury v. Bagott*, 2 Sw. 608, per cur.
 (*i*) *Bovy v. Smith*, 2 Ch. Ca. 124; *S. C.* 1 Vern. 60, 84, 144; *Kennedy v. Daly*, 1 Sch. & Lef. 379, per Lord Redesdale.
 (*k*) See *Bovy v. Smith*, 2 Ch. Ca. 126.
 (*l*) *Cordwell v. Mackrill*, 2 Ed. 347; *S. C.* Amb. 517.

is all Lord Camden means ; but in this case the equity is *clear (m)*."

The rule, that " heirs of the body " in articles shall be construed " first and other sons," does not appear to have been fully established till about the year 1720 (*n*): Lord Hardwicke therefore said, that notice of *ancient* articles, that is, of articles before the doctrine was well settled, should not bind a *bonâ fide* purchaser (*o*). And afterwards, in a case of both articles and settlement before marriage, the settlement reciting the articles, Lord Hardwicke thought that, as the equity in this instance rested upon a single authority (*p*), and that as between the parties and their representatives and mere volunteers, the purchaser ought not to be bound by the claim of the issue (*q*). But notice of *modern* articles, that is, of articles entered into since the clear establishment of the rule, will affect a purchaser (*r*); but, even then, the articles themselves must be produced, that the Court may judge from the whole instrument; for the true construction depends upon the words, and other parts of the deed may be material to find out their meaning (*s*).

In a case where a residuary legatee had enjoyed for nineteen years a copyhold estate, which had been mortgaged to the testator in fee, and then the heir of the tes-

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| (<i>m</i>) <i>Parker v. Brooke</i> , 9 Ves. 349. | |
| 588. | (<i>q</i>) <i>Warrick v. Warrick</i> , 3 Atk. |
| (<i>n</i>) <i>By Trevor v. Trevor</i> , 1 P. 291. | |
| W. 622. | (<i>r</i>) <i>Senhouse v. Earle</i> , Amb. |
| (<i>o</i>) <i>Senhouse v. Earle</i> , Amb. 288, <i>per</i> Lord Hardwicke ; and see | |
| 288 ; accordingly relief not asked | <i>Parker v. Brooke</i> , 9 Ves. 587. |
| against purchasers in <i>West v. Errissey</i> , 2 P. W. 349. | (<i>s</i>) <i>Cordwell v. Mackrill</i> , Amb. |
| | 515 ; S. C. 2 Ed. 344. |
| (<i>p</i>) <i>West v. Errissey</i> , 2 P. W. | |

tator recovered the land by ejectment and mortgaged it, and the residuary legatee, having neglected to assert his title to the possession for nine years, at the end of that period filed a bill in Chancery, and established his claim, it was determined that the mortgagee of the heir after the ejectment was not called upon to notice the right of the residuary legatee; for it was not that "*clear broad plain equity*" which should affect a purchaser (*t*).

A testator had given a leasehold estate to his daughter to her sole and separate use, but *without the interposition of a trustee* (*u*), and the husband, supposing himself absolutely entitled, entered into possession, and afterwards mortgaged the premises; and it was held the mortgagee was bound to notice the equitable construction of the will, as a doctrine well understood (*x*); and, the husband having obtained a reversionary lease and mortgaged it, the mortgagee was of course held conusant of the rule, that leases obtained under cover of the tenant right would be subject to the equity of the original term (*y*).

During the system of uses, and even for a short time subsequently to the statute of Hen. 8, assigns of the trustee in the *per* only, that is, by the immediate act of the trustee, were made liable to the trust; but now assigns in the *post*, or by operation of law, are also invested with the character of trustees; as, if a trustee marry, the wife is at *law* entitled to her dower, and if a female trustee marry, the husband is at *law* entitled to his curtesy, out of the trust estate; but in *equity* both tenant in

(*t*) *Hardy v. Reeves*, 4 Ves. 583.

466; *S. C.* 5 Ves. 426.

(*y*) And see *Coppin v. Ferny-*

(*u*) See *supra*, p. 149.

hough, 2 B. C. C. 291.

(*x*) *Parker v. Brooke*, 9 Ves.

dower (*z*) and tenant by the curtesy (*a*) are compellable to recognise the right of the *cestui que trust*. So a creditor of the trustee extending the trust estate under a statute (*b*), or taking a trust chattel by writ of execution (*c*), and, by the same rule, the assignees of a bankrupt or insolvent (*d*) are made subject to the equity. And if the trustee commit a forfeiture, the lord, as he succeeds to the identical estate of the forfeitor, must take the property with all the engagements and incumbrances attached to it, and is therefore liable to the trust (*e*). In the case of a forfeiture to the *King*, it was formerly held there was no equity against the Crown (*f*); but in modern times, the equity has been fully admitted, though the precise nature of the remedy has never been distinctly ascertained (*g*).

Escheat stands on a very different footing from the case of forfeiture. A lord taking by escheat is not an *assign* of the trustee either in the *per* or *post*; nor does he, as in forfeiture, succeed to the place of the trustee, but claims by a title paramount of his own, by virtue of a condition originally annexed to the land and wholly independent of the creation of the trust.

(*z*) *Pawlett v. Attorney-General*, Hard. 469, *per* Lord Hale; *Noel v. Jevon*, Freem. 43; *Hinton v. Hinton*, 2 Ves. 634, *per* Lord Hardwicke.

(*a*) *Bennet v. Davis*, 2 P. W. 319.

(*b*) *Pawlett v. Attorney-General*, Hard. 467, *per* Lord Hale; *Kennedy v. Daly*, 1 Sch. & Lef. 373, *per* Lord Redesdale; *Finch v. Earl of Winchelsea*, 1 P. W. 277; *Burgh v. Burgh*, Rep. t. Finch, 28.

(*c*) *Foley v. Burnell*, 1 B. C. C. 278, *per* Lord Thurlow.

(*d*) See *infra*, chap. 14.

(*e*) *Burgess v. Wheate*, 1 Ed. 203, *per* Sir T. Clarke; Id. 252, *per* Lord Henley.

(*f*) *Wikes's case*, Lane, 54, agreed.

(*g*) *Burgess v. Wheate*, 203; Id. 252; and see *Pawlett v. Attorney-General*, Hard. 467, which was a case of forfeiture, though treated by Lord Hale as a case of escheat. And see *supra*, p. 84.

Lord *Mansfield* was of opinion in *Burgess v. Wheate*, that a trust ought to be binding on the lord; and that, whether the escheat was to be looked upon as a reversion, which it once was, or as a caducary possession *ab intestato*, which his Lordship conceived it to be in his day (*h*). Considering the escheat as a reversion, his Lordship contended that every alienation supposed an investiture to which the assent of the lord was implied, and therefore it followed that, on failure of heirs of the alienee in trust, the lord could not claim to his own use against the terms of the grant. But to this it may be answered—first, that, since the Statute of *Quia Emptores*, it is doubtful, whether any such assent of the lord can be supposed; for, should it be optional with the lord to accept the alienee as his tenant or not, it would abridge the subject of that free power of alienation which the statute was intended to confer upon him. On the execution of the conveyance the alienee holds of the lord above, not by the lord's consent, but by the operation of law. But even admitting the lord to have assented by implication to the transfer of the land, it scarcely seems to follow that he is bound by the terms of the trust; for if A. convey to B. and his heirs in trust for C. and his heirs, the assent of the lord to the alienation appears to amount only to this—that B. and his heirs shall be tenants of the estate, and shall, as such tenants, hold in trust for C. and his heirs, not that the lord himself will execute the trust, should his own title commence by the determination of B.'s estate. But even supposing the lord to have *expressly* agreed to execute the trust in the event of an escheat, still, as on failure of heirs of the trustee the *legal estate* of the

(*h*) *Burgess v. Wheate*, 1 Ed. 229.

property becomes vested in the lord, could equity, consistently with established principles, enforce a conveyance against him on the strength of a mere voluntary contract (i)? The mere verbal agreement of the lord could in no wise be construed a declaration of trust, for, by the Statute of Frauds, every such declaration must be in writing and signed. Considering the escheat in the light of a caducary possession *ab intestato*, his Lordship's argument was, that, as the lord can only take the estate *ab intestato absolutely*, he cannot assert a claim so far as the tenant has aliened. Now the trustee by a declaration of trust makes a valid disposition of the estate in equity, and therefore a Court of equity cannot suffer the land to vest in the lord, as if no disposition had been made. But to this it may be answered, that a disposition *by way of trust* is of a totally different character from a disposition of the *legal estate*. The latter is binding upon all, whether in the *per* or *post*, whether with notice or without, whether the grantee be a purchaser or volunteer; but the existence of a trust depends on the equity against the legal tenant personally; as, if the estate be purchased for a valuable consideration without notice, the trust is determined, and the *cestui que trust* is without remedy. It follows that, as the lord claims by a title of his own paramount to the creation of the trust, the Court cannot wrest from him a lawful possession upon the

(i) See *Wycherley v. Wycherley*, B. C. C. 148; *Peacock v. Monk*, 2 Ed. 177; *Hale v. Lamb*, Id. 1 Ves. 133; *Darley v. Darley*, 294; *Coleman v. Sarel*, 3 B. C. C. 3 Atk. 400; *Graham v. Graham*, 14; *Ellison v. Ellison*, 6 Ves. 1 Ves. jun. 275; *Willan v. Willan*, 16 Ves. 82; *Penn v. Lord* 662; *Randall v. Morgan*, 12 Ves. 73; *Pulvertoft v. Pulvertoft*, 18 *Baltimore*, 1 Ves. 450. Ves. 99; *Evelyn v. Templar*, 2

ground of a trust declared by a stranger, and that subsequent to the commencement of the lord's right. A trust is binding only *as between the cestui que trust and the trustee, and all claiming by and under them*, and does not affect the interest of a *third* person (*k*). If an estate were settled on A. and his heirs, with a springing use on a certain event to B. and his heirs, a declaration of trust in fee by A. could not possibly, on the determination of A.'s estate, bind the interest of B.; yet such a limitation over is hardly to be distinguished from the case of the lord's title by escheat. The only authorities adduced by his Lordship in support of his position were the opinions said to have been expressed by Lord Chief Justice Bridgman and Sir John Trevor (*l*); but the words attributed to the former appear, from his own note-book, never to have been spoken (*m*); and the observation of Sir John Trevor was at the utmost a mere *obiter dictum*. Sir Thomas Clarke, who assisted with Lord Mansfield in the case of *Burgess v. Wheate*, declared that *cestui que trust* was no more relievable against the lord by escheat, than against a sale by the trustee to a purchaser without notice (*n*): and Lord Northington's inclination was apparently the same way, though, as the point was not necessarily involved in the question before him, he refused to conclude himself by any express and direct opinion (*o*). That the lord was not bound by a *use* is perfectly clear, and it seems, on the whole, to be the sounder doctrine that neither is he liable to the execution of a *trust*.

(*k*) *Burgess v. Wheate*, 1 Ed. 251, *per* Lord Northington. See Introduction, p. 13.

(*l*) *Burgess v. Wheate*, 1 Ed. 230.

(*m*) See Id. 230, note (*a*); and see Sir T. Clarke's observations, Id. 202.

(*n*) Id. 203.

(*o*) Id. 246.

In *copyholds* there is, properly speaking, no such thing as escheat. The freehold and inheritance are vested in the lord of the manor, and the tenant has no claim but as the lord signifies his pleasure by the entry on the court roll. If the tenant be a trustee, and no trust appears on the roll, there can be no pretence for charging the lord with an equity to which he never assented (*p*); but if a surrender be made upon a trust either *expressed* or *referred to* on the roll, the lord is estopped by this evidence of his will, and cannot afterwards claim in contradiction to his grant (*q*).

Customary freeholds have often been treated on the same footing with copyholds (*r*), but perhaps upon principle a clear distinction may be taken. In customary freeholds the *tenure* is copyhold, but in respect of *interest* the freehold and inheritance are in the tenant, and, on failure of his heirs, the lord takes in the strict sense of the word by escheat. The lands are passed by the bargain and sale, and the subsequent surrender and admittance operate merely as notice to the lord of the transfer, and acceptance by him of the grantee as tenant (*s*). If a surrender therefore be made to A. and his heirs upon trust for B. and his heirs, and the trust be entered on the roll, the effect would be the same as on the alienation of a freehold; the lord merely assents that A. shall be his tenant, and shall, as tenant, hold the land upon certain trusts, not that the lord himself will be a

(*p*) *Attorney-General v. Duke of Leeds*, 2 M. & K. 343; and see 231, *per* Lord Mansfield; *Weaver v. Maule*, 2 R. & M. 97.

Peachy v. Duke of Somerset, 1 Str. 454; *Burgess v. Wheate*, 1 Ed. 231. (r) *Weaver v. Maule*, 2 R. & M. 100, *per* Sir John Leach.

(s) *Bingham v. Woodgate*, 1 R. & M. 32.

(q) *Burgess v. Wheate*, 1 Ed. & M. 32.

trustee, should his own title commence by escheat. . And even should the construction be carried to that extent, the *cestui que trust* would still not be relievable in equity, the agreement being merely a voluntary one, and not in writing and signed as required by the Statute of Frauds.

A distinction was taken by Lord Hale between a *trust* and an *equity of redemption*. "A trust," said his Lordship, "is created by the contract of the party, and he may direct it as he pleaseth, and he may provide for the execution of it, and therefore one that comes in in the *post* shall not be liable to it without express mention made by the party; and the rules for executing a trust have often varied, and therefore they only are bound by it, who come in in privity of estate; but a power of redemption is an equitable right inherent in the land, and binds all persons in the *post* or otherwise (t), because it is an ancient right which the party is entitled to in equity (u)." But upon this distinction it must be observed, that even a trust will at the present day bind persons who take derivatively from the trustee, though in the *post*; and notwithstanding an equity of redemption amounts to what Lord Hale calls a *title* (v), there seems to be no reason why in the case of escheat the lord, who takes by title paramount, should be bound by an equity of redemption any more than by a simple trust (x).

(t) *Seem* not a purchaser without notice; see *Harding v. Harding*, Rep. t. Finch, 9; *Spurgeon v. Collier*, 1 Ed. 55.

(u) *Pawlett v. Attorney-General*, Hard. 469; and see *Bacon v. Bacon*, Tothill, 133; *Burgess v. Wheate*, 1 Ed. 206; *Tucker v. Thurstan*, 17 Ves. 133.

(v) See *Pawlett v. Attorney-*

General, Hard. 467.

(x) See *Burgess v. Wheate*, 1 Ed. 255; *Attorney-General v. Duke of Leeds*, 2 M. & K. 343; *Pawlett v. Attorney-General*, Hard. 465, in which Lord Hale and Baron Atkins thought the King was bound by an equity of redemption, was not a case of *escheat*, as called by Lord Hale, but of *forfeiture*.

The law of forfeiture and escheat, except so far as it illustrates general principles, has now become matter of little importance; for by 4 & 5 Will. 4, c. 23, sect. 2, it has been enacted, that "where any person seised of any land upon any trust or by way of mortgage *dies without an heir*, it shall be lawful for the court of Chancery (on application as directed by the Act) to appoint a person to convey." And by the following section it is declared, that "no land, chattels, or stock, vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to his Majesty, his heirs or successors, or to any corporation, lord of a manor, or other person, by reason of the *attainder* or *conviction* for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his co-trustee, or descend to or vest in his representative, as if no such attainder or conviction had taken place." And by the last section it is provided, that "where before the passing of the Act any person possessed of land, chattels, or stock, as *trustee* thereof, shall have died without an heir, or shall have been convicted of any offence, whereby the said land, chattels, or stock, have escheated or been forfeited, the said land, chattels, or stock shall be subject to the order of the court of Chancery for the use of the party beneficially interested therein, the proviso not to affect any grant made subsequently to the escheat or forfeiture, and not to operate when more than twenty years have occurred since the escheat or forfeiture." Thus of trust property in future there will be no forfeiture by the *act of the trustee*, and no *escheat by his attainder*; and in case of *escheat for failure of heirs* the Court will have authority, upon summary application by petition, to appoint a person to convey.

We shall conclude the present chapter with the inquiry how trusts arising by operation of law are affected by the Statute of Frauds (y).

By the eighth section it is enacted, that “where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect, as the same would have been if that statute had not been made, any thing therein before contained to the contrary notwithstanding.”

Lord Hardwicke, upon this clause, observed, “I am now bound down by the Statute of Frauds to construe nothing a resulting trust, but what are there called trusts by operation of law; and what are those? Why, first, when an estate is purchased in the name of one person but the money or consideration is given by another; or, secondly, where a trust is declared only as to part, and nothing said as to the rest, in which case what remains undisposed of will result to the heir at law. I do not know any other instance besides these two, where the Court has declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on *malâ fide* (z).”

But upon this opinion of Lord Hardwicke Mr. Fonblanque has made the following just remarks:—“This construction of the clauses of the Statute of Frauds restrains it to such trusts as arise by *operation of law*, whereas it clearly extends to such as are raised by *con-*

(y) 29 Car. 2, ch. 3.

(z) *Lloyd v. Spillet*, 2 Atk. 150.

struction of courts of equity; as, in the case of an executor or guardian renewing a lease though with his own money, such renewal shall be deemed to be in trust for the person beneficially interested in the old lease. It is also observable, that the first instance stated by his Lordship of a resulting trust is not so qualified as to let in the exceptions to which the general rule is subject, and the second instance is only applicable to a will, whereas the doctrine of resulting trusts is also applicable to conveyances (a)."

Both Lord Hardwicke and Mr. Fonblanque assume that the seventh or enacting clause extends to all trusts indiscriminately, and that such as arise by operation of law are only saved from the act by virtue of the subsequent exception; but the language of the latter clause, that "where any *conveyance* shall be made of any lands or tenements by which a trust or confidence shall or may arise or result &c." seems to have escaped observation; for, unless *conveyance* be taken with great violence to the meaning of words to include a *devise*, it is clear that trusts resulting under a will are not reached by the terms of the saving of the eighth section. Nor is it easy to suppose that the legislature could mean to include a devise; for the fifth and sixth sections relate exclusively to devises, and, had it fallen within the scope of the act to extend the eighth section to wills, it can scarcely be conceived that the proper and technical word should not necessarily have suggested itself. The question then arises, If resulting trusts upon a *will* are not saved by the exception, how are they not affected by force of the previous enactment? Now, as

(a) 2 Tr. Eq. 116, note (a).

the statute was directed against frauds and perjuries, it is obvious that resulting trusts were not within the mischief intended to be remedied. The aim of the legislature was, not to disturb such trusts as were raised by maxims of equity and so could not open a door to fraud or perjury, but, by requiring the *creation of trusts by parties* to be manifested in writing, to prevent that fraud and perjury to which the admission of parol testimony had hitherto given occasion. And the enactment itself is applicable only to this view of the subject; for the legislature could scarcely direct, that "all declarations or creations of trusts should be manifested and proved &c.," unless the trusts were in their nature capable of manifestation and proof; but, as resulting trusts are the effect of a rule of law, to prove them would be to instruct the Court in its own principles, to certify to the judge how equity itself operates. The exception could only have been inserted *ex majori cautela*, that the extent of the enactment might not be left to implication. But why, it will be asked, are resulting trusts upon *conveyances* excepted, and not resulting trusts upon *wills*? Because the statute had spoken only of *declarations* or *creations* of trust, and by a will no resulting trust is or can be *declared* or *created*. If lands be devised to A. and his heirs upon trust to pay the testator's debts, the resulting trust of the surplus is no new declaration or creation; the right construction is, that the testator has disposed of the legal estate to the devisee, and of part of the equitable in favour of creditors, but the residue of the equitable, though said to result, has in fact never been parted with, but descends upon the heir at law as part of the original inheritance. In *conveyances*, however, this is not equally the case; for,

if a purchase be taken in the name of a third person, a trust which had no previous existence arises upon the property in favor of the real purchaser; and so if a lease be renewed by a trustee, the equity which was annexed to the old term immediately fastens upon the new. Here, then, it is evident there is an actual *creation* of trust; and, to obviate all doubts as to the operation of the enactment, resulting trusts arising out of *conveyances* are expressly excepted.

It was formerly doubted, whether, where a purchase was taken in the name of a stranger, and the payment of the consideration by the real purchaser did not appear on the face of the deed, that fact could, since the Statute of Frauds, be established by parol. It seems to have been originally settled that it might (*b*); but in *Kirk v. Webb* (*c*) it was argued "there could be no trust unless there were a declaration in the deed to that purpose, for by the statute there could be no trust unless it were declared in writing; that if it were a resulting trust, it was made so by parol proof, which was directly contrary to the statute, and would open a door to all the mischiefs it was intended to prevent; that it would introduce an utter uncertainty into all men's titles, for the best title might be spoiled by proving the purchase money to be another person's;" and the Court, in accordance with this reasoning, determined that parol evidence was inadmissible. The decision of *Kirk v. Webb* was followed in several subsequent cases (*d*); but the doctrine, though sup-

(*b*) *Gascoigne v. Thwing*, 1 Vern. 366. see *Halcott v. Markant*, Pr. Ch. 168; *Hooper v. Eyles*, 2 Vern.

(*c*) Prec. Ch. 84. 480; *Newton v. Preston*, Pr. Ch.

(*d*) *Heron v. Heron*, Pr. Ch. 103; *Ambrose v. Ambrose*, 1 P. 163; *S. C. Freem.* 248; *Skett W.* 321; *Deg v. Deg*, 2 P. W. 414.

Whitmore, Freem. 280; *Kinder v. Miller*, Pr. Ch. 172; and

ported by numerous precedents, has since been clearly overthrown by the concurrent authorities of Lord Hardwicke (*e*), Lord Henley (*f*), Sir T. Clarke (*g*), and Sir W. Grant (*h*).

But the rule as at present established will not warrant the admission of parol evidence, where an estate is purchased by an agent, and no part of the consideration is paid by the employer; for though an agent is a trustee in equity, yet the trust is one arising *ex contractu*, and not resulting by operation of law (*i*).

And parol evidence, where admitted, must prove the fact very *clearly* (*k*); though no objection lies against mere *circumstantial* evidence, if sufficiently strong not to leave a doubt, as where the circumstances of the pretended purchaser are shown to be so mean as to make it impossible he should have paid the purchase money himself (*l*).

Should the nominal purchaser *deny* the trust by his answer, there seems to be no reason why parol evidence should not be admitted to establish the fact against him; for, before the Statute of Frauds parol evidence was undoubtedly admissible, and, as trusts by operation of law are expressly excepted from the statute, by what rule is parol evidence to be excluded (*m*)? But the solemnity of

(*e*) *Ryall v. Ryall*, 1 Atk. 59; Vern. 366; *Halcott v. Markant*, S. C. Amb. 413; *Willis v. Willis*, 2 Atk. 71. Pr. Ch. 168; *Willis v. Willis*, 2 Atk. 71.

(*f*) *Bartlett v. Pickersgill*, 1 Ed. 516.

(*g*) *Lane v. Dighton*, Amb. 409; *Knight v. Pechey*, 1 Dick. 327.

(*h*) *Lench v. Lench*, 10 Ves. 517.

(*i*) *Bartlett v. Pickersgill*, 1 Ed. 515.

(*k*) *Gascoigne v. Thwing*, 1

(*l*) *Willis v. Willis*, 2 Atk. 71, per Lord Hardwicke; and see *Lench v. Lench*, 10 Ves. 518.

(*m*) In *Bartlett v. Pickersgill*, 1 Ed. 515, where the defendant denied the trust, Lord Henley said, if the plaintiff had paid any part of the purchase, he would have admitted the evidence; and see *Edwards v.*

the defendant's oath will of course require a considerable weight of evidence to overcome its impression (*n*).

It is laid down by Mr. Sanders, that "if a person at his death leave any papers disclosing the real circumstances of the case, the Court will raise the trust even against the express declaration of the purchase deed (*o*)."
We have seen that, according to the latest authorities, parol evidence is in ordinary cases admissible against the language of the purchase deed, but if Mr. Sanders's opinion to the contrary (*p*) were well founded, it does not appear how mere papers would satisfy the requisitions of the statute; for, to have that effect, the writings ought also to be *signed* by the party. The cases of *Ryal v. Ryal* (*q*) and *Lane v. Dighton* (*r*), which are cited for the position, do not at all turn upon the distinction suggested.

It is observed by the same writer, that, "*after the death of the supposed nominal purchaser*, parol proof alone can in no instance be admitted against the express declaration of the deed (*s*); but the cases relied upon in support of this doctrine (*t*) do not distinguish between proofs in a person's lifetime and after his decease; they are cer-

Pike, 1 Ed. 267. Mr. Sanders (Uses and Trusts, c. 3, s. 7, div. 2), dissents from the doctrine; but the authorities cited by him to the contrary do not appear to warrant his conclusion.

(*n*) See *Cooth v. Jackson*, 6 Ves. 39.

(*o*) Uses and Trusts, c. 3, s. 7, div. 2.

(*p*) *Ib.*

(*q*) Amb. 413.

(*r*) Amb. 409.

(*s*) Uses and Trusts, c. 3, s. 7, div. 2.

(*t*) *Kirk v. Webb*, Pr. Ch. 84; *S. C. Freem.* 229; *Heron v. Heron*, Pr. Ch. 163; *Halcott v. Markant*, Id. 168; *Kinder v. Miller*, Id. 172; *S. C.* 2 Vern. 440; *Deg v. Deg*, 2 P. W. 414, *per* Lord King.

tainly authorities for the exclusion of parol evidence generally; but in this respect, as before noticed, they have been subsequently overruled. It would seem, upon principle, that the death of the nominal purchaser cannot affect the *admissibility* of parol testimony, whatever effect it may have in detracting from its *weight*.

In the question, whether a purchase in the name of a third person can be established by parol testimony, is involved the question, whether trust money can be followed into land by parol. A purchase with trust money is in fact a purchase paid for by the *cestuis que trust*; and on the ground that such a purchase is a trust resulting by operation of law, and not within the purview of the Statute of Frauds, it has been settled that parol evidence is clearly admissible (*u*).

(*u*) *Lench v. Lench*, 10 Ves. 413; *Lane v. Dighton*, Amb. 409; 517, *per* Sir W. Grant; *Ryall v. Balgney v. Hamilton*, Amb. 414. *Ryall*, 1 Atk. 59; *S. C.* Amb.

CHAPTER XII.

OF DISCLAIMER AND ACCEPTANCE OF THE TRUST.

HAVING treated of the creation of trusts, whether by the act of a party or by operation of law, we shall next direct our attention to the *estate* and *office* of the *trustee*, and, as a preliminary question, we propose in the present chapter to offer a few remarks upon the subject of the trustee's disclaimer or acceptance of the trust.

I. Of disclaimer.

It may be laid down as a clear and undisputed rule, that no one is *compellable* to undertake a trust (*a*). "Though a person," said Lord Redesdale, "may have agreed in the lifetime of a testator to accept the executorship, he is still at liberty to recede except so far as his feelings may forbid it, and it will be proper for him to do so, if he finds that his charge as executor is different from what he conceived it to be when he entered into the engagement (*b*)."

If the party named as trustee intend to decline the administration of the trust, he ought without delay to execute a disclaimer; and that by deed, for a deed is

(*a*) *Robinson v. Pett*, 3 P. W.
251. *per* Lord Talbot.

(*b*) *Doyle v. Blake*, 2 Sch. & Lef.
239.

clear evidence and admits of no ambiguity (*c*); and the instrument should be a *disclaimer* and not a *conveyance*, for, the latter, as it transmits the estate, has been held to imply a previous acceptance of the office (*d*); but Lord Eldon expressed his opinion, that, where the intention was disclaimer, the instrument ought to receive that construction, though it was a conveyance in form (*e*).

A trust may also be repudiated on the evidence of conduct without any express declaration of disclaimer (*f*); but a person would act very imprudently, who allowed so important a question as whether he is a trustee or not to remain matter of construction.

After renunciation of the trust, whether by express disclaimer, or by conduct which is tantamount to it (*g*), a trustee may assist as agent, or act under a letter of attorney in the management of the estate, without incurring responsibility (*h*); but the caution need scarcely be suggested, that all such interference cannot be too scrupulously avoided before the fact of the renunciation of the trust has been most unquestionably established.

What will amount to a disclaimer *at law*, so as to *divest the estate*, is a very distinct question from the disclaimer of the office in equity.

(*c*) *Stacey v. Elph*, 1 M. & K. 199, *per* Sir J. Leach.

(*d*) *Crewe v. Dicken*, 4 Ves. 97.

(*e*) *Nicloson v. Wordsworth*, 2 Sw. 372. In *Attorney-General v. Dooley*, 2 Eq. Ca. Ab. 194, the trustee who declined to act was directed to *convey*, and the same decree was made in *Hussey v. Markham*, Rep. t. Finch, 258. In *Sharp v. Sharp*, 2 B. & A. 405, it was

held the trustees had not *acted*, though they had *conveyed* the estate instead of disclaiming.

(*f*) *Stacey v. Elph*, 1 M. & K. 195.

(*g*) *Stacey v. Elph*, 1 M. & K. 195.

(*h*) *Dove v. Everard*, 1 R. & M. 231; *Harrison v. Graham*, 3 Hill's MSS. 239, cited 1 P. W. 241, 6th ed., note (*g*).

It was formerly held, (at least such was the clear opinion of Lord Coke,) that a freehold, whether vested in a person by feoffment, grant (*i*), or devise (*k*), could not be disclaimed but by matter of record; and the reason, upon which this maxim was founded, was, that the suitor might be more certainly apprised who was the tenant to the *præcipe* (*l*). But the doctrine of modern times is, that disclaimer by deed is sufficient (*m*); for, as Lord Tenterden observed, there can be no disclaimer by a person in a court of record, unless some other person think fit to cite him there to receive his disclaimer, and if the estate be *damnosa hæreditas*, that is not very likely to happen (*n*). Mr. Justice Holroyd went so far as to say, that even a deed might be dispensed with, and a party might disclaim a freehold by parol (*o*); and Sir A. Hart, whose authority however must not be too implicitly followed, has since sanctioned the doctrine by an actual decision (*p*).

It was laid down in *Butler and Baker's case*, that estates limited *under the statute of uses* were to be disclaimed with the same formalities as estates at common law (*q*); but Lord Eldon doubted whether a party could disclaim in the case of a conveyance to uses, except by

(*i*) *Butler & Baker's case*, 3 Re. 26, a, 27, a; *Anon. case*, 4 Leon. 207; Shepp. Touch. 285.

(*k*) *Bonifant v. Greenfield*, Godb. 79, *per* Lord Coke; but at the rehearing (Cr. El. 80) it was adjudged that three could pass the whole estate, the fourth having disclaimed by act in *pais*; and see Shepp. Touch. 452.

(*l*) *Butler & Baker's case*, 3 Re. 26, b.

(*m*) *Townson v. Tickell*, 3 B. & A. 31; *Begbie v. Crook*, 2 Scott, 128; and see the authorities cited in the note to the last-mentioned case.

(*n*) *Townson v. Tickell*, 3 B. & A. 36.

(*o*) *Id.* 38, citing *Bonifant v. Greenfield*, Cr. El. 80: and see *Doe v. Smyth*, 9 D. & R. 136.

(*p*) *Bingham v. Clanmorris*, 2 Moll. 253.

(*q*) 3 Re. 27, a.

release with intent of disclaimer ; but his Lordship added, he was aware that such a doctrine would shake titles innumerable (*r*).

It seems to be clearly established, that a disclaimer, even by parol declaration, will suffice to divest the legal estate, when the trust property is a mere chattel interest (*s*).

The effect of disclaimer by a trustee is to vest the whole legal estate in the co-trustees (*t*) ; and, as regards the exercise of the office, it is held, that, even if the trust be accompanied with a power, as, of signing receipts, the continuing trustees may fully administer the trust without the concurrence of the trustee who has chosen to renounce (*u*).

II. Of Acceptance of the Trust.

A trustee may accept the office either by an express declaration to that effect, or by proceeding to act in the execution of the duties of it.

With respect to the liabilities of the trustee, it is perfectly immaterial to him whether he declare his acceptance of the office or his consent be implied, for in each case the obligations imposed upon him are precisely the same (*x*). In the event of a *breach of trust* the consequences to the parties beneficially interested may admit of a slight variation. A breach of trust creates *per se* a

(*r*) *Nicloson v. Wordsworth*, Freem. 13, Case 111 ; *Hawkins v. Kemp*, 3 East, 410 ; *Townson v.*

(*s*) Shep. Touch. 285 ; *Butler Tickell*, 3 B. & A. 31 ; and see *Nicloson v. Wordsworth*, 2 Sw. 369.

Smith v. Wheeler, 1 Vent. 130 ; *S. C.* 2 Keb. 774. (*u*) *Adams v. Taunton*, 5 Mad.

(*t*) *Bonifant v. Greenfield*, Cr. 435 ; and see *infra*.

El. 80 ; *Crewe v. Dicken*, 4 Ves. (*x*) See *Lord Montfort v. Lord Cadogan*, 19 Ves. 638.

simple contract debt only (*y*); but, if the trustee has bound himself to the performance of the trust under his hand and seal, this amounts to a covenant even though the heirs be not named, and the breach of trust, thus becoming a specialty debt, will, in legal assets, take precedence of simple contract debts (*z*). If the trustee has covenanted for himself and his *heirs*, a remedy then lies at common law against the heir in respect of estates descended; and by 3 W. & M. c. 14, the like remedy was enacted against the devisees of the debtor; but this was only where the specialty would have supported an action of debt, and did not apply to a covenant which lay only in damages; but the 11 G. 4 & 1 Gul. 4, c. 47, has now perfected the remedy by extending it to the case of a covenant. A still more recent statute (*a*) has declared that the lands of a debtor shall be liable to all his debts, whether on simple contract or on specialty; but specialties, where the heir is bound, are still made to take precedence of simple contract debts, and specialties where the heir is not bound.

What *acts* of a person nominated as trustee will amount to a constructive acceptance of the office, is a question constantly occurring in practice, and generally to be determined by the circumstances of the particular case; however, the authorities upon the subject may furnish us with a few general principles.

It is held that merely proving the will, without more, is not sufficient to constitute a person *acting executor* (*b*);

(*y*) *Vernon v. Vaudry*, 2 Atk. 131; *Deg v. Deg*, 2 P. W. 414.
 119; *S. C. Barn.* 280; *Cox v.* (a) 3 & 4 W. 4, c. 104.
Bateman, 2 Ves. 19; *Kearnan v.* (b) *Balchen v. Scott*, 2 Ves. jun.
Fitzsimon, 3 Ridg. P. C. 18. 678; *Hovey v. Blakeman*, 4 Ves.
 607, *per* Lord Alvanley; but see
Mavor v. Davenport, 2 Sim. 227; *Ward v. Butler*, 2 Moll. 533.
 and see *Benson v. Benson*, 1 P. W.

but if the will clothe the executorship with a *special* trust, as, where a testator directs that his "executors" shall get in certain outstanding effects to be applied to a particular purpose, a person cannot make himself executor by proving the will, and then exempt himself from the trusts expressly annexed to the office (c). And if an executor be also trustee of the real estate, he cannot desert the situation of trustee, and accept only that of executor: the acting as executor is an acceptance of the entire trusteeship (d).

Where two persons were appointed executors, and both proved the will, but one only administered, and the other on receiving a letter by the post inclosing a bill of exchange from a debtor transmitted it to the co-executor, it was held that, as the receipt of the money by the executor through the post was not his own act, and the transmission of it was the mere consequence of the receipt, he could not be fixed with the acceptance of the executorship (e).

But any *voluntary interference with the assets*, whether with or without probate, will stamp a person as acting executor. Thus, where of four executors one only proved, and the other three gave a letter of attorney describing themselves as *executors* to the fourth, described as *acting executor*, to receive a quantity of stock, Lord Hardwicke ruled that the whole number, by this conduct, had drawn upon themselves the burden of the executorship (f).

(c) *Mucklow v. Fuller*, Jac. 198.

(d) *Ward v. Butler*, 2 Moll. 533.

(e) *Balchen v. Scott*, 2 Ves. jun. 678.

(f) *Harrison v. Graham*, 3

Hill's MSS. 239; *S. C.* cited

Churchill v. Lady Hobson, 1 P. W. 241, note (y), 6th ed.

In *Orr v. Newton* (g) A., one of six executors, *admitted in his answer* that during the life of B., another of the executors, and who had alone taken out probate, he had assisted in writing letters to the co-executors towards collecting the testator's estate, and it was *proved* that A. had written on behalf of himself and his co-executors to a debtor of the testator requiring payment. Lord Camden, notwithstanding these circumstances, observed in his argument, that "B. undertook to act *solely*, and did act *solely* until he died," implying that A. had, by his conduct, not assumed the character of executor. But the case was one of "*cruel persecution*" against A., and his Lordship put the fairest possible construction upon all that A. had done ; and besides, Lord Camden might only have meant that B. was *substantially* the sole acting executor, without adverting to the question, whether the interference of A. ought not, in strict legal construction, to be held an acceptance of the executorship.

The rule, that every voluntary interference with the subject matter will convert a person into a trustee, must be taken with this qualification, that the interference is not such as to be *plainly* referrible to some other ground than the part execution of the trust. Thus A. B. and C. were named as executors and trustees, and A. alone proved the will and administered, and sold certain chattels to B., and afterwards applied to B. as the friend of the family for advice ; B. in consequence negotiated the sale of the testator's property, and became a purchaser of part himself, taking the conveyance from A. the tenant for life and the heir-at-law, under the impression that the devise to A. B. and C. (as B. and C. did not act in the

(g) 2 Cox, 274.

trust), had become inoperative. On A.'s death B. expressly renounced the executorship. A bill was filed under these circumstances against B. as having acted in the trust and misconducted himself in that character; but Sir J. Leach was clearly of opinion that "B. had never interfered with the property, except as the friend or agent of the widow. It was true he had never executed a deed disclaiming the trust, but his conduct had disclaimed the trust. In the purchase of the small real estate made by him he had taken by feoffment from the widow and eldest son of the testator, in whom the estates could only have vested by the disclaimer of the trustee;" and his Honour dismissed the bill with costs (*h*).

But where a trustee acts *ambiguously* he cannot afterwards take advantage of the doubt, and say he acted not as trustee, but in some other character. Thus, a testator devised that the produce of a plantation should be consigned to A. and be employed by him upon certain trusts, and A. with full notice of the will received the produce of the estate, and then pleaded that he had been acting merely as factor or agent; but Lord Hardwicke said "it was incumbent on the trustee if he would not have acted to have refused, and not, going on in that ambiguous way, to leave himself at liberty to say he acted as trustee or not (*i*)."

A. and B. were trustees of a settlement, and, A. being desirous of retiring, C. was under a power in the settlement appointed in his place, but no transfer of the stock was made. C. executed the appointment, but before he had acted in the trust expressed a wish to retire. The donee of the power appointed B. *sole trustee*, and the

(*h*) *Stacey v. Elph*, 1 M. & K. 376.
 195; and see *Dove v. Everard*, (*i*) *Conyngham v. Conyngham*,
 1 Russ. & Myln. 231; *S. C. Taml.* 1 Ves. 522.

stock was transferred by A. into the name of B., and was misapplied. C. was held under the circumstances not to be responsible (*k*).

Elizabeth Marriott had purchased a sum of stock in the names of Kinnersley, Kaye, and Meggison, and effected a policy of insurance for 2,000*l.* upon her own life. A deed, after an interval of more than a year, was executed between Elizabeth Marriott of the one part, and Kinnersley, Kaye, and Meggison, of the other part, by which the trusts of the stock and policy were declared in favour of Charles Marriott. The deed of trust was dated in 1815, and in 1819 the trustees joined in a power of attorney to Kaye, Mrs. Marriott's solicitor, who sold out the stock, received the proceeds, misapplied the money, and became insolvent. Upon a bill filed by Charles Marriott for restitution of the stock it was pleaded by Kinnersley, that he *never had executed or seen the deed, nor had consented to become a trustee under it*, that he had refused to allow the stock to be purchased in his name, and, not knowing that the stock was invested upon any other trust than for Mrs. Marriott, he had executed the power of attorney to Kaye, who was Mrs. Marriott's solicitor. It appeared that Kaye's application to Kinnersley to join in the power of attorney was by a letter, wherein occurred the passage that "*it was necessary for the advancement of Charles Marriott that the stock should be sold out.*" Sir J. Leach said, "Mr. Kinnersley's case is very hard; but the question is, whether he has not incautiously done an act which has placed this property in the hands of individuals who have abused it. He will be charged with no dividends *prior to his acting*, but is only liable for the fund transferred." (*l*)

(*k*) *Wilkinson v. Parry*, 4 Russ. 272.

(*l*) *Marriott v. Kinnersley*, Tambl. 470.

CHAPTER XIII.

WHAT ESTATE WILL BE VESTED IN THE TRUSTEE.

UPON the subject of the legal estate in the trustee we shall address ourselves to two questions :—first, What quantity of legal estate the trustee will take under the instrument ; and secondly, What will be the devolution and properties of the estate vested in the trustee. The present chapter will confine itself to the former branch of the inquiry.

As legal limitations are properly cognizable by a common law court, it might naturally be supposed that the construction put upon the instrument would stand wholly unaffected by the circumstance of the creation of the trust. But, as the effect of a deed or will is to be ruled by the intention, and every person in limiting an estate to a trustee must be guided by the equity he proposes to raise upon it, the Court is necessarily led to enter upon the consideration of the trust, in order to measure the extent of the legal interest by the scope and object of the equitable. The following rules of construction have in consequence been adopted :—

First, Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied : secondly, The legal estate limited to the trustee shall not be carried farther than the complete execution of the trust necessarily requires.

1. To illustrate the first of these rules, the Court has in some instances *supplied the estate in toto*; as, where a testator had devised to a *feme covert* the issues and profits of certain lands to be paid by his executors, it was held the land itself was devised to the executors in trust to receive the rents and profits to the use of the wife (*a*).

In other cases the Court has *extended the estate*, as where the devise was to three trustees, and the survivor of them, and the executors and administrators of such survivor, upon trust to pay certain annuities for lives, and it was ruled that the trustees took an estate for the several lives of the annuitants (*b*).

So a trust to sell (*c*), even on a contingency (*d*), confers a fee simple as indispensable to the execution of the trust; and the construction is the same in a sale implied, as where the devise is upon trust out of the rents and profits of an estate to discharge certain legacies made payable at a day inconsistent with the application of the annual profits only (*e*).

But a power of selling will not be implied by a limit-

(*a*) *Bush v. Allen*, 5 Mod. 63; and see *Oates v. Cooke*, 3 Bur. 1684.

(*b*) *Doe v. Simpson*, 5 East, 162; and see *Atcherley v. Vernon*, 10 Mod. 523; *Oates v. Cooke*, 3 Bur. 1684; *Shaw v. Weigh*, 2 Str. 798; *Jenkins v. Jenkins*, Willes, 650. In *Doe v. Simpson* a life estate only was implied, as the trustee was merely such; but, in *Jenkins v. Jenkins*, the trustee being also interested beneficially, the construction was more liberal, and

it was thought the fee simple passed.

(*c*) *Shaw v. Weigh*, 2 Str. 798; *Bagshaw v. Spencer*, 1 Ves.

144, *per* Lord Hardwicke; and see *Glover v. Monckton*, 3 Bing. 13, 10 Moore, 453. As to *Hawker v. Hawker*, 3 B. & Ald. 537, and *Warter v. Hutchinson*, 5 Moore, 143, S. C. 1 B. & C. 721, see remarks *infra*.

(*d*) *Gibson v. Lord Montfort*, 1 Ves. 485, see page 491.

(*e*) *Gibson v. Lord Montfort*, *ubi supra*.

ation to a trustee, or to a trustee his executors and administrators, upon trust to pay debts and legacies generally (*f*), or (*semble*) to raise a sum of money (*g*). In such cases, where nothing in the context implies the limitation of the fee, a chattel interest only will pass; but, if a greater estate be limited expressly, as by a devise to A. and his heirs upon trust to pay debts, the Court has no jurisdiction to cut down the expression and reduce the estate to a chattel (*h*).

2. To illustrate the second rule, in a case where a copyhold was devised to A. and his heirs upon trust for the separate use of a *feme covert* during her life, and after her decease in trust as the *feme* should appoint, and in default of appointment to the testator's right heirs, it was thought by Judge Heath that the trustee took a base fee determinable on the life of the *feme*, and by Judge Chambre, that the devise amounted only to an estate *pur autre vie* (*i*). But it seems that such a limitation in a deed, where the construction is narrower, would have conferred the fee simple (*k*).

So in a devise to A. for life, remainder to trustees and their heirs to preserve contingent remainders, (the words "during the life of A." being omitted,) with remainders over, the trustees were construed to take not a fee simple,

(*f*) Co. Lit. 42. a.; *Cordal's case*, Cr. El. 315; *Carter v. Barnadiston*, 1 P. W. 505; *Hilchins v. Hilchins*, 2 Vern. 403; *Doe v. Simpson*, 5 East, 171, *per* Lord Ellenborough, C. J.; *Roberts v. Dixwell*, 1 Atk. 609, *per* Lord Hardwicke.

(*g*) *Doe v. Simpson*, 5 East, 162; and see *Bosworth v. Forard*,

O. Bridg. Rep. 167; *Thomason v. Mackworth*, Id. 507; Co. Lit. 42. a., note (7), Butler's ed.

(*h*) *Wright v. Pearson*, 1 Ed. 119, see page 123.

(*i*) *Doe v. Barthrop*, 5 Taunt. 382.

(*k*) *Wykham v. Wykham*, 11 East, 458; see *S. C.* 18 Ves. 419, and following pages.

but an estate for the life of A. (*l*). And Sir W. Grant expressed himself in favour of a similar construction where the instrument was a deed (*m*), but it has since been decided that in the latter case a fee simple passes (*n*). Of course there can be no such restriction of the estate by implication where the natural sense of the words admits of a fair and reasonable construction, as if the fee in the trustees would support any contingent limitations that would otherwise be left to the mercy of the tenant for life (*o*).

Upon the principle we are now considering, if the legal estate be given to trustees and their heirs upon a trust not executed by the statute during the life of A, and after A's decease to uses in strict settlement, the vesting of the estate in the trustee during the life of A. will not prevent the operation of the statute in executing the uses in remainder (*p*).

Thus, in the much disputed, but, as it appears, rightly decided case of *Jones v. Lord Say & Seal* (*q*), where a testatrix devised to trustees and their heirs upon trust to pay the legacies devises and bequests thereafter mentioned, (some life annuities only were given,) and to pay the residue of the rents and profits as her daughter should appoint for her life, and after her decease the

(*l*) *Doe v. Hicks*, 7 T. R. 433; as to *Boteler v. Allington*, 1 B. C. C. 72, see *Doe v. Hicks*, 7 T. R. 435, and *Wykham v. Wykham*, 18 Ves. 418.

(*m*) *Curtis v. Price*, 12 Ves. 89; but see *Wykham v. Wykham*, 18 Ves. 419, and following pages.

(*n*) *Colmore v. Tyndall*, 2 Y. & J. 605.

(*o*) *Venables v. Morris*, 7 T. R. 342, 438; and see *Curtis v. Price*, 12 Ves. 100; *Doe v. Hicks*, 7 T. R. 437.

(*p*) *Doe v. Simpson*, 5 East, 171, per Lord Ellenborough; *Robinson v. Grey*, 9 East, 1; *Doe v. Ironmonger*, 3 East, 533.

(*q*) 8 Vin. 262.

trustees to “stand seised” of the premises to certain uses, “subject to the payment of the several annuities:”—it was held by the court that the legal estate during the life of the daughter was vested in the trustees, but that the remainder expectant upon her decease was executed to the *cestuis que use*: the trustees were not required to be *agents* after the death of the daughter, but were simply, subject to the payment of the annuities, which meant only, subject to the annuities, to stand seised to uses.

So, where a testator devised to three trustees and their heirs subject to the following uses and estates, viz. in trust to permit two persons to receive annuities, and, subject thereto, he devised the premises to the trustees and their heirs until A. attained twenty-one upon certain trusts; and, when A. should attain twenty-one, he devised the premises to the trustees and their heirs to uses in strict settlement, it was held that the trustees took a chattel interest only, and that the uses in remainder were executed by the statute (*r*). The testator prefacing each limitation with a devise to “the trustees and their heirs,” the repetition of these words was probably regarded as surplusage, and the will was construed as follows—“I devise the estate to the trustees and their heirs to the following uses, to the use that A. and B. may receive annuities, and subject thereto to the use of the trustees until A. attain twenty-one, and on A.’s attaining twenty-one to uses in strict settlement.” Independently of this construction, it seems the devise to the trustees and their heirs until A. attained twenty-one would only have the effect of communicating a chattel interest (*s*), for as every estate of a

(*r*) *Warter v. Hutchinson*, 5 Moqr. 143; *S. C.* 1 B. & C. 721. but see *Lethieullier v. Tracy*, 3 Atk. 780; *Fearne’s Conting. Rem.*

(*s*) *Goodtitle v. Whitby*, 1 Bur. 226, Butler’s note.
228; *Doe v. Lea*, 3 T. R. 41;

certain and definite duration, though determinable on a life, is a chattel in its nature, the limitation to the heirs would be rejected as repugnant.

In *Harton v. Harton* (t) a testator devised to A. and B. and their heirs upon trust to permit C., a *feme covert*, to receive the rents during her life for her separate use, and after her decease to the use of her first and other sons in tail, and in default of such issue to the use of the daughters in tail as tenants in common, and in default of such issue upon trust to permit D., a *feme covert*, to take the rents during her life for her separate use, with remainder to the use of her first and other sons in tail, with remainder to her daughters in tail as tenants in common, and in default of such issue, upon trust to permit E., a spinster, to receive the rents during her life for her separate use, with like remainder to the use of her first and other sons in tail, with remainder to her daughters in tail as tenants in common, and it was determined that the fee simple was in the trustees; but this decision can scarcely be reconciled with principle, and seems to have presented some difficulty to the mind of Lord Eldon. "The Court," said his Lordship, "held that the legal estate was in the trustees throughout, as it appears to me, for this reason, that, there being various trusts for the separate use of married women after various trusts not for married women, those trusts could not subsist unless the legal estate was in the trustees from the beginning to the end, and they relied on the non-repetition of a legal estate (u)."

But if a devise be to trustees and their heirs upon a trust that cannot be executed without an absolute control over the property, as upon trust to lease for an in-

(t) 7 T. R. 652.

(u) *Hawkins v. Luscombe*, 2 Sw. 391.

definite number of years (*x*), or to raise a sum of money by sale (*y*), and subject thereto to uses in strict settlement, the trustees will not be held to take a mere power so as to let in the statute to execute the uses, but will be construed to take the legal estate in fee, and the uses that are limited will stand as equitable interests.

It has been observed in the "Treatise of Powers" (*z*), that this rule was not attended to in the case of *Hawker v. Hawker* (*a*). The devise in that case was to three trustees and their heirs upon trust to sell the testator's lands at H. for payment of his debts, and, in case the proceeds should be insufficient, then as to his lands at F. upon trust to sell for the like purpose, and to dispose of the surplus moneys in manner thereafter directed, and, in case it should not be necessary to dispose of the said lands at F., then as to such his lands (*inter alia*) upon trust for the maintenance of his daughter till twenty-one, and, on her attaining twenty-one, to the use of the trustees during her life, and after her decease to the use of her children, and the Court certified as to the lands at F., that the trustees did not take a larger estate than for the life of the daughter. The devise was probably considered to be of a double aspect, viz. to the trustees and their heirs upon trust to sell &c. if one event happened, and upon trust for the daughter, &c. if another event happened. The latter series of limitations took effect, and therefore, as no

(*x*) *Doe v. Willan*, 2 B. & Ald. 84; but see *Heardson v. Williamson*, 1 Keene, 33.

(*y*) *Wright v. Pearson*, 1 Ed. 123; *Bagshaw v. Spencer*, 1 Ves. 142; *Glover v. Monckton*, 3 Bing. 13; *Bale v. Coleman*, 2 Eq. Ca.

Ab. 309, note (*e*); *Sanford v. Irby*, 3 B. & Ald. 654; *Jones v. Morgan*, 1 B. C. C. 206: for a correct report of the will, see Fearne's

C. R. Appendix, No. 3.

(*z*) Ch. 2, sect. 1.

(*a*) 3 B. & Ald. 537.

power of sale was to be exercised by the trustees, it was not necessary under the circumstances to arm them with the inheritance.

The case of *Warter v. Hutchinson* (b) is more difficult to be reconciled with the rule we are discussing. The limitations, so far as they concern the present subject, were to trustees and their heirs to the following uses, viz. to the trustees their heirs and assigns until A. attained twenty-one, upon trust as soon as convenient after the testator's decease to raise out of the rents and profits, or by sale or mortgage thereof, a sum sufficient for the payment of debts, funeral expenses, and the costs of the trustees, and also the sum of 2,000*l.* to be applied in manner therein directed, the residue of the rents and profits, after payment of debts, funeral expenses, and the sum of 2,000*l.*, to be paid to A. on his attaining twenty-one, and when A. should attain twenty-one the testator devised the premises to the trustees and their heirs to uses in strict settlement; and the Court certified that the trustees took a chattel interest, and not the fee-simple. The construction appears to have been, that, as the limitation to the trustees and their heirs was expressly limited to the period *until A. attained twenty-one*, the estate was intended to be a chattel interest only, and the charges were to be raised either by sale or mortgage of that chattel interest, or out of the inheritance by virtue of an implied power.

(b) 5 Moore 143; S. C. 1 B. & C. 721.

CHAPTER XIV.

THE DEVOLUTION AND PROPERTIES OF THE LEGAL ESTATE
IN THE TRUSTEE.

THIS branch of our subject we propose to consider, first, with reference to the common law ; and, secondly, with reference to the construction of particular statutes.

I. As regards the common law, it may be stated as a general rule, that the legal estate in the hands of the trustee will have precisely the same properties and incidents as if the trustee were the usufructuary owner. Thus, the trust estate will be subject to curtesy (*a*), dower (*b*), and freebench (*c*), will be liable to forfeiture (*d*), on the decease of the trustee will descend to his heir, and, failing the heir, will fall by escheat to the lord (*e*).

So personalty held upon trust will be forfeitable for the offence of the trustee (*f*), (but in the case of two joint

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| (<i>a</i>) <i>Bennet v. Davis</i> , 2 P.W. 319. | (<i>d</i>) <i>Pawlett v. Attorney-General</i> , Hard. 466, per Lord Hale ; |
| (<i>b</i>) <i>Noel v. Jevon</i> , Freem. 43 ; | <i>Geary v. Bearcroft</i> , Cart. 67, per |
| <i>Nash v. Preston</i> , Cr. Car. 190. | cur. |
| (<i>c</i>) <i>Hinton v. Hinton</i> , 2 Ves. | (<i>e</i>) Jenk. 190, c. 92. |
| 631, 638 ; <i>Bevant v. Pope</i> , Freem. | (<i>f</i>) <i>Pawlett v. Attorney-General</i> , Hard. 466, per Lord Hale ; |
| 71 ; and see <i>Brown v. Raindle</i> , 3 | |
| Ves. 256. | |

trustees a moiety only will be forfeited, and the King and the other trustee will be tenants in common (i), and on the decease of the trustee the chattel, as part of the personal estate, will devolve on the executor or administrator.

And it seems the better opinion, that a chattel interest held upon trust may be taken in execution for the debt of the trustee; for, so soon as the writ of execution reaches the sheriff's office, it binds the goods and chattels of which the debtor is then possessed, and a trust estate, as well as a beneficial ownership, must be subject to the *lien*, for the common law can scarcely operate differently where it recognises no distinction. The *sheriff* is a mere instrument for the execution of the legal process, and property, which the common law holds liable, the sheriff can have no discretion to exempt upon grounds of equity. It was said, however, by Mr. Justice Ashhurst, "Suppose a person has goods as a trustee for certain purposes, which was made known to the sheriff before the sale, if the sheriff persist in selling, it would in my opinion be a tortious act in him (h);" but the doctrines which in the last century confounded the legal and equitable jurisdictions have been since overruled; and Lord Thurlow seems to acknowledge the *legal right* against the trustee, by observing, that, if a creditor of the trustee take the goods in execution, he will himself become a trustee by construction of equity (i).

Assets in the hands of an executor are regarded even by the common law as a species of trust property, and

Wikes's case, Lane, 54; *Scounden* (h) *Farr v. Newman*, 4 T. R. v. *Hawley*, Comb. 172, *per* Dolben, 647.
J.; Jenk. 219, c. 66; Ib. 245, c. (i) *Foley v. Burnell*, 1 B. C. C. 30. 278.

(g) *Wikes's case*, Lane, 54.

in respect of them has ingrafted upon itself a *quasi* equitable jurisdiction: thus, if an executrix marry, the goods and chattels of the testator do not, even at law, vest in the husband, though he survive (*k*); nor can they be taken in execution for the debt of the executor (*l*); and, if he commit felony or treason, they are exempted from forfeiture to the King (*m*); and if the executor die intestate, instead of vesting in his administrator, they vest in the administrator *de bonis non* of the testator (*n*).

A trust estate, whether real or personal, may, like a beneficial estate, be conveyed, assigned, or incumbered by the trustee at law; and, if there be co-trustees, each may exercise the like powers of ownership over his own proportion.

And, as the trustee may dispose of the property in his lifetime, so he may devise or bequeath it at his death. But a trust estate will not in all cases *pass by the same words* in a will as a beneficial ownership would, for wherever the law does not operate solely, but through the medium of the intention, it becomes necessary, in order to ascertain the effect of the instrument, to take into consideration the particular circumstances of the trust.

Whether a trust estate shall pass inclusively in a *general devise*, is a question that has been frequently under discussion. The rule as originally established was, that a general expression would carry a dry trust estate (*o*), but afterwards there were some misgivings upon the sub-

(*k*) Co. Lit. 351. a., 351. b.

(*n*) *Ib. per eundem; Rachfield v.*

(*l*) *Farr v. Newman*, 4 T. R. 621.

Careless, 2 P. W. 161, *per* Powis, J.

(*m*) *Farr v. Newman*, 4 T. R. 628, *per* Grose, J.

(*o*) *Marlow v. Smith*, 2 P. W. 198.

ject (*p*) (1), and the Court at last acceded to the proposition, that general words would not pass trust estates, unless there appeared a positive intention that they should so pass (*q*). The question was reconsidered before Lord Eldon, when the result of the cases, after a careful examination of them, was declared to be, that, where the will contained words large enough, and there was no expression authorizing a narrower construction, nor any such disposition of the estate as it was unlikely a testator would make of property not his own as complicated limitations, or any purpose inconsistent with as probable intention to devise as to let it descend, in such a case the trust estate would pass (*r*).

A charge of debts, legacies, annuities, &c., and, *a fortiori*, a direction to sell, is considered a sufficient indication of an intention not to include a mere trust estate (*s*);

(*p*) See *Braybrooke v. Inskip*, 8 Ves. 437. 436; see *Roe v. Reade*, 8 T. R. 118; *ex parte Morgan*, 10 Ves.

(*q*) *Attorney-General v. Buller*, 101.

5 Ves. 340.

(*s*) *Roe v. Reade*, 8 T. R. 118;

(*r*) *Braybrooke v. Inskip*, 8 Ves. *Duke of Leeds v. Munday*, 3 Ves.

(1) The doubt appears to have originated in part from an expression of Lord Hardwicke in *Casborne v. Scarfe*, 1 Atk. 605, that by a devise of all lands, tenements and hereditaments, a mortgage in fee would not pass, unless the equity of redemption were foreclosed. But Lord Hardwicke was not speaking here of the legal estate, but of the beneficial interest in the mortgage. The same thing was said in the same sense in *Strode v. Russel*, 2 Vern. 625. Lord Hardwicke's authority has been cited on both sides of the question (compare *Duke of Leeds v. Munday*, 3 Ves. 348, with *ex parte Sergison*, 4 Ves. 147); but that he approved of the old rule is evident from *ex parte Bowes* cited in Mr. Sanders's note to *Casborne v. Scarfe*, 1 Atk. 605. Lord Northington and Lord Thurlow are said to have entertained the same opinion; (see *ex parte Sergison*, 4 Ves. 147; but, as to Lord Thurlow, see an *obiter dictum*, *Pickering v. Bowles*, 1 B. C. C. 198).

and so where a testator gave, devised, and bequeathed to trustees all such real estates as were then vested in him by way of mortgage the better to enable his said trustees to recover, get in, and receive the principal monies and interest which might be due thereon, it was held the devise extended only to mortgages vested in the testator beneficially, and did not pass the legal estate of a mortgage in fee vested in him upon trust for another (*t*).

The expression "*my* real estates" will not restrict the meaning to those vested in the testator beneficially (*u*), nor a devise to A. his heirs and assigns "to and for his and their own proper use and behoof (*x*)," nor it seems a devise "to A. and B. to be equally divided between them as tenants in common and to their respective heirs(*y*)," nor a devise to A. in tail, with remainders over (*z*). But, where lands are limited in strict settlement, with a vast number of limitations, contingent remainders, executory devises, powers of jointuring, leasing, and raising sums of money, it cannot for a moment be supposed the testator meant to include any lands of which he had not the absolute disposition (*a*).

A vendor, after the contract for sale but before the completion of it, is a trustee for the purchaser *sub modo* only, and the estate will pass by a general devise in his will,

348; *Attorney-General v. Buller*, 5 Ves. 339; *ex parte Morgan*, 10 Ves. 101; see *Wall v. Bright*, 1 J. & W. 494.

(*t*) *Ex parte Morgan*, 10 Ves. 101; and see *ex parte Brettell*, 6 Ves. 577.

(*u*) *Braybroke v. Inskip*, 8 Ves. 425.

(*x*) Compare *ex parte Brettell*, 6

Ves. 577, with *Braybroke v. Inskip*, 8 Ves. 434.

(*y*) *Ex parte Whitacre*, at the Rolls, 22 July 1807, cited 1 Sand. Uses & Trusts, 359, 4th ed.

(*z*) *Ex parte Bowes*, 1744, cited in Mr. Sanders's note to *Casborne v. Scarfe*, 1 Atk. 605.

(*a*) *Braybroke v. Inskip*, 8 Ves. 434, *per* Lord Eldon.

where it would not have been included had the testator been a mere and express trustee. "A constructive and a naked trustee," said Sir T. Plumer, "for many purposes stand in different situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could therefore never have contemplated a disposition of it for his own purposes. A vendor was at one time both the legal and beneficial owner, and may again become so if any thing should happen to prevent the execution of the contract. It may turn out the title is not good, or the purchaser may be unable to pay, or he may become bankrupt. The purchaser is not entitled to the possession unless stipulated for, and if he should take possession it would be a waiver of any objections to the title. If the purchase money has not been paid, a court of equity would restrain him at the instance of the vendor." And upon these grounds his Honor held in the case that elicited the above remarks, that an estate which was the subject of a contract was included in a general devise to trustees though upon trust to sell (*b*).

As the dry legal estate in the hands of the trustee is affected by the operation of law, and may be disposed of by the act of the trustee, precisely in the same manner as if it were vested in him beneficially, so it confers upon him all the legal privileges, and subjects him to all the legal burdens, that are incident to the usufructuary possession (*c*).

Thus the trustee can bring any action respecting the trust estate in a court of law, the *cestui que trust*, though the absolute owner in equity, being at law regarded in the

(*b*) *Wall v. Bright*, 1 J. & W.
494.

(*c*) *Burgess v. Wheate*, 1 Ed.
251, *per* Lord Northington.

light of a stranger (*d*). So, the trustee of a manor is the person to appoint the steward of it (*e*), and the trustee of an advowson to present to the Church; but in either case he has the mere legal right, and is bound in equity to observe the directions of his *cestui que trust* (*f*).

And originally the trustee as the legal proprietor had the right of voting for coroners (*g*) (1), but by the 58 G. 3, c. 95, sect. 2, it was enacted, that "no person should be allowed to have any vote for or by reason of any trust estate, or mortgage, unless such trustee or mortgagee should be in actual possession or receipt of the rents and profits of the same estate, but that the mortgagor or *cestui que trust* in possession should vote for the same."

So the trustee was the person entitled at *common law* to vote for members of Parliament (*h*); but by the 8 H. 6, c. 7, it was enacted, that every elector should have "a freehold of the value of forty shillings a year at the least, *above all charges*," and the sheriff was authorised to "examine every elector upon oath how much he might *expend by the year*," and "if he could not *expend forty shillings by the year*," he was disabled from voting. It can scarcely be doubted that from the time of this enact-

(*d*) See *Allen v. Imlett*, Holt, Ves. 7, *per eundem*; *Kensey v. Langham*, Cas. t. Talb. 144, *per*

(*e*) *Mott v. Buxton*, 7 Ves. 201. Lord Talbot; *Amhurst v. Dawling*,

(*f*) *Attorney-General v. Parker*, 2 Vern. 401.

3 Atk. 577, *per* Lord Hardwicke; (*g*) *Burgess v. Wheate*, 1 Ed. 251.

Attorney-General v. Forster, 10 Ves. 338, *per* Lord Eldon; *Attorney-General v. Newcombe*, 14 251, *per* Lord Northington.

(1) And Lord Northington added for "sheriffs," (*Burgess v. Wheate*, 1 Ed. 251,) but the election of sheriffs had been transferred from the people to the Chancellor, Treasurer, and Judges, by 9 E. 2, st. 2, before the establishment of trusts.

ment a trustee, had the sheriff questioned his qualification, could not have satisfied the requisitions of the act, but the sheriff probably did not exercise this right of interrogation, and therefore the trustee, as he was the *freeholder* though he could not expend the rents, was allowed to continue in the enjoyment of the franchise, particularly as the *cestui que trust*, who had not the freehold, was at all events excluded. The 7 and 8 Gul. 3, c. 25, s. 7, enacted, that "no person should vote for or by reason of any trust estate or mortgage, unless such trustee or mortgagee was in actual possession or receipt of the rents and profits of the same, but that the mortgagor or *cestui que trust* in possession should vote for the same." By the effect of this clause, the *cestui que trust*, if in possession, was now for the first time entitled to a vote, and the trustee in that case was expressly excluded from the privilege; if the trustee was in possession or in receipt of the rents and profits, the Legislature, without any positive enactment, seems to have regarded the trustee as qualified by the trust estate to be an elector. The 10 Anne, c. 23, s. 2, declared, that "no person should vote who should not have received the rents or profits, or be entitled to have received the same to the full value of forty shillings or more to his own use for one year before such election." The statute of H. 6 had *apparently* excluded the trustee, the statute of William had *expressly* disabled him if not in actual possession or in receipt of the rents and profits, and now by this last enactment of Anne he was incapacitated from giving a vote in any case. By the same statute, any candidate or voter was authorized to administer an oath to the elector at the time of polling, but, among the qualifications particularly enumerated in the oath, that of

"receipt of the rents and profits *to his own use* for one year before the election" was by some oversight omitted. This defect was afterwards remedied by the 18 G. 2, c. 18. s. 1, which incorporated into the oath the declaration that the elector had been "*in the actual possession or receipt of the rents and profits to his own use* for two calendar months" before the election. It must be observed that the words "actual possession, or receipt of the rents and profits," correspond to the expression in the statute of Anne, "who shall not have *received the rents and profits* to his own use," and therefore the words "to his own use" in the statute of George must be taken to apply to "actual possession" as well as to "the receipt of the rents and profits." We now come to the Reform Act (i), which first, by the 23rd section, re-enacts the provision of the statute of William, that no trustee or mortgagee shall vote "unless he be in actual possession or receipt of the rents and profits," and then, as the oath prescribed by the statute of George was for the time to come abolished, restores the effect of it (with a slight variation) by the directions relating to the registration of voters contained in the 26th section. It then declares, that, "notwithstanding any thing thereinbefore contained, no person shall be registered in any year in respect of his estate or interest in any lands or tenements as a freeholder, copyholder, &c. unless he shall have been in the actual possession thereof, or in receipt of the rents and profits thereof *for his own use* for six calendar months previous to the last day of July in such year." So that the Reform Act seems to have left the law in respect of trustees precisely on the same footing on which it stood be-

(i) 2 Gul. 4, c. 45.

fore the act was passed. The inference is that a mere trustee is now in all cases excluded from the franchise. It has been said that the 23rd and 26th sections are contradictory, but "trustees" in the former section may reasonably be taken to mean, not a bare trustee, but one who has also a beneficial interest in the estate; as, where a conveyance is made by way of mortgage to A. and his heirs upon trust to pay himself in the first instance, and, subject thereto, upon trust for the grantor. But, supposing the two clauses to be absolutely conflicting, the latter must undoubtedly prevail over the former: an Act of Parliament is not like a deed, which, being irrevocable in its nature, binds the party as it proceeds; but resembles rather a will, which, being ambulatory until the testator's death, may be revoked by any subsequent declaration of intention, whether contained in the same or in any other instrument. An Act of Parliament is no estoppel upon the legislature, but may be varied from time to time by the promulgation of any subsequent statute. The 26th section declares, that, "*notwithstanding any thing thereinbefore contained,*" the voter shall be in the actual possession or receipt of the rents and profits "to his own use," and the 23rd section must either be reconciled with that enactment or be rejected as repugnant. By the Registration Amendment Bill, introduced the last session in the House of Commons but thrown out in the House of Lords, it was proposed that trustees of charities should be entitled to vote; it is probable that in the course of the next session either this or some similar provision may be passed into law.

Again, the trustee of a copyhold must pay a fine on his admission (*k*), and on his decease a heriot becomes

(*k*) *Earl of Bath v. Abney*, 1 Dick. 260; *S. C.* 1 Bur. 206.

due to the lord (*l*). But, where two or more trustees have been admitted *jointly*, on the decease of *one* neither fine nor heriot is due; not a fine for admission, because, joint tenants being seised *per my et per tout*, the estate has vested in the survivors by the original grant, and not a heriot, because, however many in number the trustees may be, they all form but one tenant to the lord, and therefore no heriot is demandable until the death of the longest liver (*m*). Where a number of trustees are admitted as the joint owners of the trust estate, the fine is to be assessed upon the following principle: for the first life is to be allowed the fine usually paid on the admission of a single tenant, on the second life one half the sum taken for the first, and on the third one half the sum taken for the second, &c.; the result of which will be, that, however great the number of the trustees admitted, the amount of the whole fine will never be double of that paid upon the first life (*n*). Though the manorial burdens fall upon the trustee personally at law, he is of course entitled in equity to reimburse himself the expenditure out of the profits of the estate (*o*).

If a trustee trade *jure alieno* on the foot of the trust, he makes himself amenable to the operation of the bankrupt law (*p*), and on his decease his lands will be liable under Sir Samuel Romilly's Act (*q*) to the discharge of simple contract debts (*r*).

(*l*) *Trinity College v. Browne*, 10 Ves. 119, *per* Lord Eldon; 1 Vern. 441; see *Car v. Ellison*, 3 Atk. 77. *Hankey v. Hammond*, cited in marginal note to 1 Cooke's Bank.

(*m*) See 2 Watk. Cop. p. 147.

(*n*) *Wilson v. Hoare*, 2 B. & Ad. 360, *per* Lord Tenterden.

(*o*) *Rivet's case*, Moore, 890.

(*p*) *Wightman v. Townroe*, 1 M. & S. 412; *ex parte Garland*,

Law, 84, 3rd ed.

(*q*) 47 G. 3, c. 74. Repealed, and re-enacted by 11 G. 4 & 1 Will. 4, c. 47.

(*r*) *Longuet v. Hockley*, Feb. 16, 1836, Exch. Moss Levy,

II. Of the legal estate in the trustee with reference to the construction of particular statutes.

By the 6 G. 4, c. 16, ss. 63 & 64, and by 1 & 2 W. 4, c. 56, ss. 25 & 26, it is enacted, that "all the present and future personal estate of the bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all lands, tenements and hereditaments, except copyhold or customaryhold, to which the bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements or hereditaments, and of which he might have disposed, and all such lands, tenements and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate," shall vest in the assignees of such bankrupt.

The operation of the Bankruptcy Acts was thus commented upon by Lord Chief Justice Willes:—"The assignees," he said, "under a commission of bankruptcy are not to be considered as *general assignees* of all the real and personal estate of which the bankrupt was seised and possessed, as *heirs* and *executors* are of the estate of their

a trader in partnership with his brother Lewis Levy, and his cousin Walter Levy, devised and bequeathed all his real and personal estate to Hockley, upon trust to convert the same into money, and to stand possessed of the proceeds upon certain trusts in the will mentioned. Hockley, in breach of his duty, continued the business with

the two co-partners in the name of the testator, and died indebted to the trust estate in the sum of 1,100*l.*, and without leaving sufficient personal assets. Baron Alderson held clearly, that Hockley was a trader within the meaning of the statute, and his lands were liable for the money due to the trust.

ancestors and testators, for nothing vests in the assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts (s)."

It is clear, therefore, that, in the case of a *bare trust*, the property, whether real (t) or personal (u), will not vest by the bankruptcy in the assignees, even *at law*. And the proposition applies not only to the case of *express trustees*, but also of *trustees virtute officii*, as executors, administrators (x), factors (y), &c.

And, where the trust estate or fund has been converted into property of a different character, the new acquisition will equally be protected against the effects of the bankruptcy; for the product or substitute of the original thing must follow the nature of the thing from which it proceeded (z). Thus, if goods consigned to a factor be sold by him and reduced into money, so long as the money can be identified, as, where it has been kept in bags, the employer, and not the creditors, will

(s) *Scott v. Surman*, Willes, 402.

(t) *Ex parte Gennys*, 1 Mont. & Mac. 258.

(u) See *Winch v. Keeley*, 1 T. R. 619; *Carpenter v. Marnell*, 3 B. & P. 40; *Gladstone v. Hadwen*, 1 M. & S. 517.

(x) *Howard v. Jemmet*, 3 Bur. 1369, *per* Lord Mansfield; *ex parte Butler*, 1 Atk. 213, *per* Lord Hardwicke; *Viner v. Cadell*, 3 Espin. 88; *Farr v. Newman*, 4 T. R. 629, *per* Grose, J.; *see ex parte Ellis*, 1 Atk. 101.

(y) *Godfrey v. Furzo*, 3 P. W.

186, *per* Lord King; *Tooke v. Hollingworth*, 5 T. R. 226, *per* Lord Kenyon; *L'Apostre v. Le Plaistrier*, cited *Copeman v. Gil-lant*, 1 P. W. 318; *DeLauney v. Barker*, 2 Star. 539; *Boddy v. Esdaile*, 1 Carr. 62; *see ex parte Dumas*, 2 Ves. 582; *S. C.* 1 Atk. 232; *Paul v. Birch*, 2 Atk. 633; *Ryall v. Rolle*, 1 Atk. 172; *see ex parte Chion*, note (A) to *Godfrey v. Furzo*, 3 P. W. 187.

(z) See *Taylor v. Plummer*, 3 M. & S. 575; *Scott v. Surman*, Willes, 404.

have the benefit of that specific sum (*a*). When money is said to have no ear-mark, the meaning is no more than this, that, being the currency of the country, it cannot be followed when once it has passed in circulation (*b*).

So, if the factor sell the goods and take *notes* in payment, the value of the notes, notwithstanding the bankruptcy, may be recovered by action from the assignees (*c*); for, though negotiable securities are said, like money, to have no ear-mark, the expression does not intend that such securities in the hands of a bankrupt have run into the general mass of his property, and pass to his assignees, but only that negotiable securities, as a circulating medium in lieu of money, cannot be recovered from a person to whom they have been legally negotiated. But even notes, should they fall into possession otherwise than in a due course of circulation, as by trover, do not by that accident become the property of the finder, but may be followed into his hands by the original possessor (*d*).

So, if a factor sell the goods of his employer for money payable at a future day, and become bankrupt, and the assignees receive the money, they will be answerable for it to the merchant by whom the factor was employed (*e*).

In another case the conversion had been in *breach of the factor's duty* (*f*), and it was argued, that, as the prin-

(*a*) *Tooke v. Hollingworth*, 5 Bur. 457.

T. R. 227, *per* Lord Kenyon; see *Taylor v. Plumer*, 3 M. & S. 571.

(*b*) *Miller v. Race*, 1 Bur. 457, *per* Lord Mansfield; see *Taylor v. Plumer*, 3 M. & S. 571.

(*c*) *Anon. case*, cited *ex parte Dumas*, 2 Ves. 586.

(*d*) *Hartop v. Hoare*, 3 Atk. 50, *per* Lee, C. J.; *Miller v. Race*, 1

(*e*) *Ryall v. Rolle*, 1 Atk. 172, *per* Burnet, J.; *Taylor v. Plumer*, 3 M. & S. 577; *Zinck v. Walker*, 2 W. Bl. 1154; *Garrat v. Cullum*, Bull. N. P. 42.

(*f*) *Taylor v. Plumer*, 3 M. & S. 562; see *Ryall v. Rolle*, 1 Atk. 172.

principal would not have been bound to accept the property which the agent had wrongfully purchased, the Court ought not to give a *lien* to the principal upon the tortious acquisition; but the Court said, it was impossible that an abuse of trust could confer any right on the person abusing it, or those claiming in privity with him (*g*).

Where the legal property does not pass, any action against the assignees must be brought by the bankrupt himself, for he is the person possessed of the legal right (*h*); but, in the case of a *factor*, an action may also be brought by the principal, for, the absolute property remains with the employer, and a special property only vests in the agent (*i*). But, if *bills* be remitted to a factor, and made payable to him or his order, it has been doubted whether the property does not so vest in the factor that no action of trover can be maintained by the principal (*k*).

If the property possessed by the bankrupt in his character of trustee has become so amalgamated with his general property that it can no longer be identified, the representative of the trust has then no other remedy but to come in as a general creditor, and prove for the amount of the loss (*l*). But, in one case, though the trust money had got *into* the general fund, it was held, but under very particular circumstances, that it had subsequently *got out again* (*m*).

Where the trust is constructive, and only a doubtful equity, the legal property will pass to the assignees, for

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| (<i>g</i>) <i>Taylor v. Plumer</i> , 3 M. & S. | 539; <i>Boddy v. Esdaile</i> , 1 Car. 62. |
| 574, <i>per</i> Lord Ellenborough. | (<i>k</i>) <i>Ex parte Dumas</i> , 2 Ves. 583. |
| (<i>h</i>) <i>Winch v. Keeley</i> , 1 T. R. | (<i>l</i>) <i>Ex parte Dumas</i> , 1 Atk. 234, |
| 619; <i>Carpenter v. Marnell</i> , 3 B. & | <i>per</i> Lord Hardwicke; <i>Ryall v.</i> |
| P. 40. | <i>Rolle</i> , 1 Atk. 172, <i>per</i> Burnet, J.; |
| (<i>i</i>) <i>L'Apostre v. Le Plaistrier</i> , | <i>Scott v. Surman</i> , Willes, 403, 404, |
| cited <i>Copeman v. Gallant</i> , 1 P. W. | <i>per</i> Willes, C. J. |
| 318; <i>Delauney v. Barker</i> , 2 Star. | (<i>m</i>) <i>Ex parte Sayers</i> , 5 Ves. 169. |

the statute vests in them every property (*n*) where there is the remotest possibility of any benefit to the creditors (*o*). But only the *legal* property will pass, for the *cestuis que trust* may have the same relief in equity against the assignees, as they would have been entitled to against the bankrupt himself (*p*).

By the 6 G. 4, c. 16, s. 72, it is enacted that "if any bankrupt, at the time he becomes bankrupt, shall by the consent and permission of the true owner thereof have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission."

It has been decided that this enactment does not apply where the possession of the goods by the bankrupt can be satisfactorily accounted for by the circumstances of the title, as, if a trustee be in possession of effects upon trust for payment of debts, and become bankrupt (*q*), or if goods be vested in A. upon trust to permit B. to have the enjoyment during his life, and B. become bankrupt

(*n*) *Bennet v. Davis*, 2 P. W. 316; *Taylor v. Wheeler*, 2 Vern. 564; *Carpenter v. Marnell*, 3 B. & P. 40. *Mills*, 2 V. & B. 309, per Sir W. Grant; *Tyrrell v. Hope*, 2 Atk. 558; *Bowles v. Rogers*, 6 Ves. 95, note (*a*); *ex parte Hanson*, 12 Ves. 349, per Lord Eldon; *ex parte Coysegame*, 1 Atk. 192; see

(*o*) *Carpenter v. Marnell*, 3 B. & P. 41. *Meslaer v. Gillespie*, 11 Ves. 624; *ex parte Herbert*, 13 Ves. 188; *Ivaring v. Coventry*, 2 M. & K. 406.

(*p*) *Bennet v. Davis*, 2 P. W. 316; *Taylor v. Wheeler*, 2 Vern. 564; *Mitford v. Mitford*, 9 Ves. 100, per Sir W. Grant; *ex parte Dumas*, 2 Ves. 585, per Lord Hardwicke; *Hinton v. Hinton*, 2 Ves. 633, per eundem; *Grant v.*

(*q*) *Copeman v. Gallant*, 1 P. W. 314.

while in possession under his equitable title (*r*). So the enactment does not extend to a lawful and necessary possession *en auter droit*, as that by executors and administrators (*s*); but there will be no exemption from the forfeiture if the executor can be proved to have dismissed the character of personal representative, and to have assumed that of absolute owner (*t*). Upon the same principle must be excepted from the operation of the clause the possession of goods by factors in the ordinary course of trade (*u*).

And where the possession is *not* justified by the title, yet the property is protected, if the possession be not had with the *consent of the legal owner*; as, where the trust was for the separate use of the wife, and the husband took possession without any authority from the trustee, and afterwards became bankrupt (*x*).

2. By the Insolvent Act, 7 Geo. 4, c. 57, s. 11, "all the real and personal estate of the prisoner" is made to vest by his conveyance and assignment in the provisional assignee, and by sect. 30, where goods are in the possession of the insolvent by the consent of the true owner, they are made to pass to the assignee, as if they were the insolvent's own property.

Upon these two enactments of the Insolvent Act we have only to remark, that, as they substantially follow

(*r*) *Ex parte Martin*, 19 Ves. P. 293; *Whale v. Booth*, cited 491; *S. C.* 2 Rose, 331; see *ex parte Horwood*, 1 Mont. & Mac. 169. *Farr v. Newman*, 4 T. R. 625, note (*a*).

(*s*) *Ex parte Marsh*, 1 Atk. 158; *Joy v. Campbell*, 1 Sch. & Lef. 328. (*u*) *Ex parte Pease*, 19 Ves. 46, per Lord Eldon; *L'Apostre v. Le Plaistrier*, cited *Copeman v. Gallant*, 1 P. W. 318.

(*t*) *Fox v. Fisher*, 3 B. & A. 135; see *Quick v. Staines*, 1 B. & 618. (*x*) *Jarman v. Woolloton*, 3 T. R.

the provisions of the bankruptcy acts, they must in the analogous cases be governed by the same construction.

3. Judgments, at least so far as they affect *lands*, (for execution against goods and chattels is by common law,) derive their effect from certain statutory enactments (*y*).

Had trusts been established at the time these statutes were passed, the construction would probably have been the same as in the case of the bankruptcy and insolvency acts, that is, judgments had been held to bind those lands only of which the conusee was seised beneficially; but trusts at the period of which we are speaking had not made their appearance, and therefore judgments have been held to bind all lands of the conusee, whether vested in him beneficially, or in the character of trustee. But of course the *cestui que trust* will be protected from the legal process by application to a Court of Equity (*z*).

(*y*) 11 E. 1; 13 E. 1, st. 1, c. 1 P. W. 277; *Burgh v. Francis*, 1 18; 13 E. 1, st. 3; 27 E. 3, st. 2, Eq. Ca. Ab. 320; *Medley v. Martin*, Finch, 63.
c. 9; see Co. Lit. 289, b.

(*z*) *Finch v. Earl of Winchelsea*,

CHAPTER XV.

THE GENERAL PROPERTIES OF THE OFFICE OF TRUSTEE.

FROM the *estate* of the trustee we pass to the consideration of his *office*, and upon this subject we may in the first place investigate the *general* properties annexed to the office, as, 1. That a trustee having once accepted cannot afterwards renounce it. 2. That he cannot delegate it. 3. That in the case of co-trustees the office must be exercised by all the trustees jointly. 4. That on the death of one trustee the trust will vest in the survivors. 5. That one trustee shall not be liable for the acts of his co-trustee. 6. That a trustee shall derive no advantage from the office.

I. It is a rule, without any exception, that a person who has once undertaken the office, either by actual acceptance or by construction of law, cannot discharge himself from liability by a subsequent *renuntiation*. The only mode by which he can obtain a release is either under the sanction of a Court of Equity, or by virtue of a special power in the instrument creating the trust, or with the universal consent of the parties interested in the estate (*a*).

(*a*) See *Doyle v. Blake*, 2 Sch. & Lef. 245; *Chalmer v. Bradley*, 1 J. & W. 68.

Thus, where A. was named executor, and acted in behalf of some particular legatees, but disclaimed the intention of interfering generally, and then renounced, and B. obtained letters of administration *cum testamento annexo*, and possessed himself of assets and died insolvent, it was held that A., having acted, could not afterwards discharge himself, and was therefore responsible for the *devastavit* committed by B. (b).

So, in another case, where A., having possessed himself of assets, renounced the administration, and the same day B. proved the will, and A. handed over part of the assets to him, and afterwards A., having received other assets by authority from B., handed them over in like manner, Sir Thomas Clarke delivered his opinion, that, as A. had administered though without having proved the will, the attempt at renunciation was void, and he ought to be charged with all the subsequent receipts (c).

Though a trustee may have given a bond for the due execution of the trust, and the *cestui que trust* may have recovered upon the bond, and been paid the money, yet, if the *cestui que trust* afterwards bring his bill to compel a conveyance, the trustee cannot divest himself of his fiduciary character by pleading that the penalty of the bond was a stated damage for the breach of trust, and on payment of the penalty the trustee was to be released. A conveyance however will not be decreed without an allowance to the trustee of the penalty recovered upon the bond, with interest at the usual rate (d).

(b) *Doyle v. Blake*, 2 Sch. & Lef. 231. (d) *Moorcroft v. Dowding*, 2 P. W. 314.

(c) *Read v. Truelove*, Amb. 417.

II. The office of trustee, being one of personal confidence, cannot be *delegated*.

If the trust be of a discretionary character, not only is the trustee answerable for all the mischievous consequences of the delegation (*e*), but the exercise of the discretion by the substitute will be actually void (*f*).

An advowson was vested in twenty-five of the principal inhabitants of a parish upon trust to elect and present a proper preacher, and, some of the trustees having deputed proxies to vote at the election, Lord Hardwicke said, "It is true a trustee who has a legal estate in him may make an attorney to do legal acts; but here is a personal trust, and there is no instance where a trustee is allowed to make a proxy to vote in a personal trust of this kind. The trustees were themselves to judge of the qualifications of the candidates, and could not delegate that judgment to others, but ought to exercise it themselves." And his Lordship held, that, as the election had been conducted in this manner, it could not be supported (*g*).

And a discretion can no more be committed to a *co-executor* or *co-trustee* than to a stranger (*h*). Thus, where a sum of money was given to three executors upon trust to distribute in charity at their discretion, and the executors assumed each the independent control of one-third, Lord Hardwicke said, "I am of opinion the executors could not divide the charity into three parts, and each executor nominate a third absolutely, because the deter-

(*e*) *Adams v. Clifton*, 1 Russ.

297; *Hardwick v. Mynd*, 1 Anst.

109; see case cited by Sir J.

Jekyll, *Walker v. Symonds*, 3 Sw.

79, note (*a*).

(*f*) See *Alexander v. Alex-*

ander, 2 Ves. 643.

(*g*) *Attorney-General v. Scott*,

1 Ves. 413; see 417.

(*h*) *Crewe v. Dicken*, 4 Ves. 97.

mination of the property of *every* object was left by the testator to the direction of *all* the executors (*i*)."

Nor, if a trustee convey the estate, will the transfer of the estate have the effect of investing the grantee with the power (*k*).

If the trust be not discretionary, and the trustee delegate the execution of it to the instrumentality of a stranger, the trustee must undoubtedly answer for the conduct of the person he has substituted; but it does not follow that an act of that person, done in pursuance of the trust, and requiring no personal exercise of judgment, may not be valid; as, if A. be a trustee for sale, and he delegates the duty to B., who sells accordingly, the *cestui que trust* may unquestionably hold A. accountable for the due application of the purchase-money; but can he also set aside the sale, however fair, as against the purchaser?

W. Mynd had devised certain estates to G. Mynd and Roberts in trust for the payment of debts. G. Mynd and Roberts conveyed the estates to W. Mynd, the son, subject to the trusts of the will. The son mortgaged the greater part of the trust-estates, and applied the proceeds in the payment of his own debts. One of the questions debated was, whether the mortgages by the son were to stand good as against the creditors of the testator. Lord Chief-Baron Eyre observed, "If the trustees had made the mortgages, they would not have been disturbed; in fact they were made by them, for they assigned their

(*i*) *Attorney-General v. Gleg*, 1 *Atk.* 356. *neral*, 2 *Eq. Ca. Ab.* 194; *Bradford v. Belfield*, 2 *Sim.* 264; *Cole*

(*k*) *Crewe v. Dicken*, 4 *Ves.* 97, *v. Wade*, 16 *Ves.* 47, *per* Sir W. Grant.

whole interest to W. Mynd, the son, to act for them in the trust." The mortgages were therefore held to be good, but the trustees were made responsible to the parties interested for the misapplication of the proceeds (*l*).

Bradford v. Belfield (*m*), before the present Vice-Chancellor, was this. One Berry had conveyed an estate by way of mortgage to Whidborne as trustee for Baker his heirs and assigns, and it was declared that the conveyance was so made to Whidborne and his heirs upon special trust and confidence in him the said Whidborne and *his heirs* reposed, and to the intent and purpose only that he and they should, as soon as to him and them should seem meet, upon request to him and them for that purpose made by Baker, his executors, administrators, and assigns, make absolute sale of the fee-simple and inheritance of the estate in such lots as he and they should think proper, and the receipt of Whidborne his heirs executors administrators and assigns was to be a sufficient discharge. Whidborne died intestate, and Baker died, and appointed executors. The heir of Whidborne, at the request of Baker's executors, conveyed to Bradford in fee upon trust to sell, and the Vice-Chancellor determined that Bradford, as the assign of Whidborne's heir, could not make a title. The question however in this case was taken to be, not how far a *trust* could be delegated, but whether a *power of sale* had under the circumstances arisen; and upon the authority of *Townsend v. Wilson*, a case exactly in point, his Honor decided in the negative.

A distinction must be observed between the delegation

(*l*) *Hardwick v. Mynd*, 1 Anst. *Inskip*, 8 Ves. 432.
109; and see *Lord Braybrooke v.* (*m*) 2 Sim. 264.

of the office, and the employment of *agents* on proper occasions. It cannot be expected that trustees should personally execute all the details of their duty, nor would it be desirable for the interests of the *cestuis que trust*. The ignorance of the trustee would often be more injurious than his honour and good intention would be beneficial as a safeguard (*n*).

It must also be noticed, that the appointment of an *attorney* or *proxy* is not in all cases a delegation of the trust. When the trustee has resolved in his own mind in what manner to exercise his discretion, he cannot be said to delegate any part of the confidence if he merely execute the deed by attorney, or signify his will by proxy. Thus, in the case before cited (*o*), where the trust was to elect and present a proper clerk to a benefice, Lord Hardwicke had no doubt that, so far as related to the mere act of presentation, the trustees, having themselves fixed upon the object, might have signed the presentation by proxy: a trustee who had a legal estate might make an attorney to do legal acts.

III. Where the administration of the trust is vested in co-trustees, they all form as it were but one collective trustee, and therefore must execute the duties of the office in their *joint* capacity. If any one refuse to act, it is not competent for the others to proceed without him, but the administration of the trust must in that case devolve upon the Court (*p*). A receipt for money (*q*), a cer-

(*n*) Upon this subject see *infra*.

(*p*) *Doyly v. Sherratt*, 2 Eq.

(*o*) *Attorney-General v. Scott*, 1 Ves. 413; and see *ex parte Rigby*, 19 Ves. 463.

Ca. Ab. 742, marginal note to (D).

(*q*) See *infra*.

tificate to a bankrupt (*r*), &c., must receive the joint signature of the whole body, and not of the majority merely, or it will not be valid.

IV. On the death of one trustee the joint office *survives*.

It is a well known maxim that a *bare authority* committed to several persons is determined by the death of any one; but, if coupled with an interest, it passes to the survivors (*s*). Thus, the committees of a lunatic's estate are regarded in the light of mere bailiffs without a spark of interest, and if one of them die the office is immediately extinguished (*t*). An executorship or administratorship survives (*u*); for, "If," says Lord Talbot, "a joint estate at law will survive, why shall not a joint administration, when they both have a joint estate in it?" (*x*) So a guardianship vests in the survivors, for, as a guardian may bring an action and avow in his own name, may grant leases during the minority of the ward, and demise copyholds even in reversion as lord *pro tempore*, it is evident he has an interest (*y*). It follows that as co-trustees have an authority coupled with an interest, their office also must be impressed with the quality of survivorship (*z*); as, if an estate be vested in two trustees upon

(*r*) *Ex parte Rigby*, 19 Ves. 143.
463; *S. C.* 2 Rose, 224.

(*s*) *Co. Lit.* 113. a., 181. b.; *Butler v. Bray*, Dyer, 189. b.; *Attorney-General v. Gleg*, 1 Atk. 356; *S. C.* Amb. 584; Goulds. 2. pl. 4; *Peyton v. Bury*, 2 P. W. 628; *Mansell v. Vaughan*, Wilm. 49; *Eyre v. Countess of Shaftesbury*, 2 P. W. 108, 121, 124.

(*t*) *Ex parte Lyne*, Rep. t. Talb.

(*u*) *Adams v. Buckland*, 2 Vern. 514; *Hudson v. Hudson*, Rep. t. Talbot, 127.

(*x*) *Hudson v. Hudson*, Rep. t. Talb. 129.

(*y*) *Eyre v. Countess of Shaftesbury*, 2 P. W. 102.

(*z*) *Hudson v. Hudson*, Rep. t. Talb. 129, *per* Lord Talbot; *Co.*

Lit. 113. a.; *Attorney-General v.*

trust to sell and one of them die, the other may sell (*a*); if an advowson be conveyed to trustees upon trust to present a proper clerk, the survivors or survivor may present (*b*). Otherwise, indeed, the more precaution a person took by increasing the number of the trustees, the greater would be the chance of the abrupt determination of the trust by the death of any one. But, if a discretionary trust be framed in the words of a power, as in a gift to A. and B. upon trust to distribute as the said A. and B. shall think proper, it may be questioned whether the authority ought not to be construed as a power, and to be extinguished by the death of one (*c*). It seems the survivorship of the trust will not be defeated because the settlement contains a power for restoring the original number of trustees by new appointments (*d*); unless there be something in the instrument that specially manifests such an intention (*e*). Even in an Act of Parliament, which declared in very strong terms that the survivors *should* (*f*), and *they were thereby required* to appoint new trustees, the Court said the proviso was analogous to the common one in settlements, and expressed an opinion, (for the decision was upon another point,) that the clause was not imperative, but merely of a directory character (*g*).

Glegg, Amb. 585, per Lord Hardwicke; *Guilliams v. Rowell*, Hard. 204; *Billingsley v. Mathew*, Toth. 168.

(*a*) See Co. Lit. 113. a.

(*b*) See *Attorney-General v. Bishop of Litchfield*, 5 Ves. 825.

(*c*) See *infra*.

(*d*) See *Doe v. Godwin*, 1 D. & R. 259; compare *Townsend v. Wilson*, 1 B. & Ald., 608, with *Hall v. Dewes*, Jac. 193; and see

Attorney-General v. Floyer, 2 Vern. 748.

(*e*) *Foley v. Wontner*, 2 Jac. & Walk. 245.

(*f*) As to the force of the words "shall and may" in an Act of Parliament, see *Attorney-General v. Lock*, 3 Atk. 166; *Stamper v. Millar*, Id. 212.

(*g*) *Doe v. Godwin*, 1 D. & R. 259.

The case of *Attorney-General v. the Bishop of Litchfield* (*h*), though not immediately in point, may be cited as touching upon the subject: A testator had devised to eight persons and their heirs the donation and parsonage of a rectory, and “desired their care to present from time to time a learned, *painful* preacher, honest in life and conversation, whereby souls might be gained to Christ;” and directed that “the three last survivors should make choice of new trustees to be added to them successively to present.” The representative of the last surviving trustee conveyed to one Hodgets and his heirs; Eliza, the wife of Foley, was the heiress-at-law of Hodgets, and, the advowson having descended upon her, Foley presented a clerk. An injunction was applied for to stay the institution, and Lord Eldon said, “Upon what ground am I to interfere to prevent the Bishop from instituting upon a presentation under the legal title? It is said with great foundation this trust ought to be filled up; but, if an avoidance happens before the trust is filled up, the trustee executes the duty by presenting a proper person. If there is any objection to the clerk presented by him, as, if he presented for emolument to himself, the Court should interfere; but it would be very inconvenient if I were to hold that there can be no presentation till the number is filled up, when by negligence it has happened that the number is not filled up. If three trustees remained, I could not prevent their choice of new trustees to be added to them to present. The filling up the trustees might take a considerable time, and a lapse might incur; but I agree this is not a proper act of Mr. Foley, when the trust is reduced to his wife.”

V. One trustee shall not be *liable for the acts or de-*

(*h*) 5 Ves. 825.

faults of his co-trustee, whether a proviso to that effect be inserted in the original settlement or not (*i*). This point appears to have been first clearly established by the decision of *Townley v. Sherborne* (*k*) in the reign of Charles the First: a case that, from the curious air of importance with which it is ushered in by the reporter, and the sound and practical reasoning that pervades the argument from the bench, will be found, it is conceived, at the same time interesting and instructive.

A., B., C., and D. were trustees of some leasehold premises. A. and B. collected the rents during the first year and a half, and *signed acquittances*; but from that period the rents were uniformly received by an assign of C. The liability of A. and B. during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands? "The Lord Keeper Coventry (says the reporter) considered the case to be of great consequence, and thought not to determine the same suddenly, but to advise thereof, and desired the Lords the Judges Assistant to take the same into their serious consideration, whereby some course might be settled that parties trustees might not be too much punished, lest it should dishearten men to take any trust, which would be inconvenient on the one side, nor that too much liberty should be given to parties trustees, lest they should be emboldened to break the trust imposed on them, and so be as much prejudicial on the other side. And the Lord Keeper and the Lords the Judges Assistant afterwards conferring together, and upon mature deliberation conceiving the case to be of great

(*i*) *Leigh v Barry*, 3 Atk. 584, 12 Mod. 560.

per Lord Hardwicke; *Anon. case*, (*k*) Bridg. 35.

importance, his Lordship was pleased to call unto him also Mr. Justice Crook, Mr. Justice Barclay, and Mr. Justice Crawley, for their assistance also in the same, and appointed precedents to be looked over as well in the Court of Chancery as in other Courts, if any could be found touching the point in question ; whereupon several precedents were produced before them, some in the Court of Chancery and some in the Court of Wards, where parties trustees were chargeable only according to their several and respective receipts, and not one to answer for the other, but no precedent to the contrary was produced to them. Whereupon his Lordship, after long and mature deliberation on the case, and serious advice with all the said Judges, did this day in open Court declare the resolution of his Lordship and the said Judges—That where lands or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits and after dyeth or decayeth in his estate, his co-trustee shall not be charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing appear to have been in them to prejudice the trust ; for, they being by law joint tenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by. And it being the case of most men in these days that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part of their real estate to make up the same, either by the sale or the perception of the profits thereof ; and if such of their friends who carry themselves without fraud should be chargeable out of their own estate for the faults and deficiencies of their co-trustees

who were not nominated by them, few men would undertake any such trust. And if two executors be, and one of them wastes all or any part of the estate, the *devastavit* shall by law charge him only, and not the co-executor. And in that case *æquitas sequitur legem*, there being many precedents resolved in Chancery, that one executor shall not answer nor be chargeable for the act or default of his companion. And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands and are put in trust out of other respects than to be troubled with the receipt of the profits. And albeit, in all presumption, this case had often happened, yet no precedent had been produced to his Lordship or the Judges, that in any such case the co-trustee had been charged for the act or default of his companion; and therefore it was to be presumed that the current and clear opinion had gone that he was not to be charged, it having not till of late been brought into question in a case that by all likelihood had often happened. But his Lordship and the said Judges did resolve, that, if upon the proofs or circumstances the Court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing."

Co-trustees (*l*) however, as was determined in the case just stated, were formerly considered responsible for money

(*l*) *Townley v. Sherborne*, Bridg. Sw. 78, note (*a*); but said by 35; *Spalding v. Shalmer*, 1 Vern. Lord Cowper, *Fellowes v. Mitchell*, 303; *Sadler v. Hobbs*, 2 B. C. C. 2 Vern. 516, to be contrary to 114; and see *Bradwell v. Catchpole*, cited *Walker v. Symonds*, 3 natural justice.

if they joined in signing the receipt for it ; but in later times the rule has been established, that a trustee who joins in a receipt for mere conformity's sake shall not be answerable for a misapplication by the trustee who receives (*m*). Where the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in this their joint capacity; it would be tyranny, therefore, to punish a trustee for an act which the very nature of his office will not permit him to decline.

But it lies upon the trustee, who joins in the receipt for mere conformity, to prove that his co-trustee was the person by whom the money was actually received. In the absence of all evidence, the effect of a joint receipt is to charge each of the trustees *in solido* (*n*) ; as, if a mortgage be devised to three trustees, and the mortgagor with his witness meets them to pay it off, and the money is laid on the table, and the mortgagor, having obtained a reconveyance and receipt for his money, withdraws, each of the trustees in this case will be answerable

(*m*) *Brice v. Stokes*, 11 Ves. 324, *per* Lord Eldon; *Harden v. Parsons*, 1 Ed. 147, *per* Lord Northington; *Westley v. Clarke*, 1 Ed. 359, *per eundem*; *Heaton v. Marriot*, cited *Aplyn v. Brewer*, Pr. Ch. 173; *ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Leigh v. Barry*, 3 Atk. 584, *per eundem*; *Fellows v. Mitchell*, 1 P. W. 81; *Sadler v. Hobbs*, 2 B. C. C. 117, *per* Lord Thurlow; *Chambers v. Minchin*, 7 Ves. 198, *per* Lord Eldon; *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves. 479, *per eundem*; *Harrison v. Graham*, 3 Hill's MSS. 239, *per* Lord Hardwicke, cited 1 P. W. 241, 6th ed. note (*y*); *Carsey v. Barsham*, cited *Joy v. Campbell*, 1 Sch. & Lef. 344, *per eundem*; *Anon. case*, Mose. 35.

(*n*) *Brice v. Stokes*, 11 Ves. 324, *per* Lord Eldon; *Scurfield v. Howes*, 3 B. C. C. 95, *per* Lord Thurlow.

for the whole (*o*). A joint receipt at law is *conclusive* evidence that the money came to the hands of both, but in equity, which rejects estoppels and pursues the truth, the Court will decree according to the justice and verity of the fact (*p*). “Where,” said Lord Cowper, “it cannot be distinguished how much was received by one trustee and how much by the other, it is like throwing corn or money into another man’s heap, where there is no reason that he who made this difficulty should have the whole; on the contrary, because it cannot be distinguished he shall have no part (*q*).”

Of course a trustee will not be exempt from liability if he sign a receipt for money which the purposes of the trust do not require, for there can be no legal necessity for his joining in the receipt when the payment of the money ought never to have been called for. Thus in *Hanbury v. Kirkland* (*r*) Kaye, one of three trustees of a marriage settlement with a power of varying the securities, applied to his co-trustees to sign a warrant of attorney for sale of the stock, on the ground that he had an opportunity of investing the trust fund upon good landed security at five per cent. interest. The co-trustees signed the warrant of attorney, and Kaye sold out the stock and misapplied the proceeds. The following year one of the co-trustees wrote to Kaye to inquire if he had procured an eligible mortgage, when Kaye replied, he had failed in obtaining the mortgage he had originally contemplated, but he was in hopes of investing the fund on another security equally desirable. Two years after Kaye absconded

(*o*) *Westley v. Clarke*, 1 Ed. 359, *per* Lord Henley.

(*p*) *Harden v. Parsons*, 1 Ed. 147, *per eundem*.

(*q*) *Fellows v. Mitchell*, 1 P. W. 83.

(*r*) 3 Sim. 265; and see *Mariott v. Kinnersley*, Taml. 470.

and the money was lost. It was held the co-trustees were responsible, and principally on the ground that, "it being their duty to inquire what was the security and who was the mortgagor, they had executed the power of attorney without exercising a single act of discretion, relying entirely upon the representation made to them by Kaye."

And though a trustee joining in a receipt may be safe in merely permitting his co-trustee to be the receiver in the first instance, yet he will not be justified in allowing the money to remain in his hands for a longer period than the circumstances of the case may reasonably require.

This doctrine appears to have been very little regarded in the time of Lord Talbot. In *Attorney-General v. Randall* (s) a testator had bequeathed 650*l.* to A. B. and C. for erecting an almshouse; A., who resided in London, had received the money, B. and C., who were domiciled in Cornwall, having joined in the receipt; A. applied 400*l.* to the purposes of the trust, and four years after the receipt became insolvent; B. and C. were held not to be liable. Lord Talbot said, "If the money had been lodged in a banker's hands *bonâ fide*, and he had failed, would the trustees have been answerable? And if they intrust one of themselves for convenience or necessity at a time when he is solvent, which is no more than making him their banker, shall equity punish where there is no default? I see no reason why trustees may not make one of themselves their cashier where there is no fraud, and this was a reasonable thing at the time, as A. was the only trustee in London when the money was paid. As to the objection of

(s) 21 Vin. Ab. 534.

letting the money lie so long in A.'s hands, the case of a trustee differs from the case of a common banker where the money may be drawn out at pleasure ; but here A. had as good right to the keeping it as the others, and all was paid out to the purposes of the trust except about one-third."

But subsequent cases have since established a much stricter principle.

Thus, in *Brice v. Stokes* (t), a very leading case upon the subject, Mooring and Fielder, two trustees with a power of sale, conveyed the estate in 1784 to a purchaser, and both signed the receipt, but Fielder alone actually received. In 1794 Fielder died insolvent without having accounted for the money paid to him, and it was proved in evidence that Mooring was conusant of the misemployment of the fund, though he took no active measures for recovering it out of Fielder's hands. Lord Eldon said, " Though a trustee is safe if he does no more than authorise the receipt and retainer of the money so far as the act is within the due execution of the trust, yet if it is proved that a trustee, under a duty to say his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, admits that, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it or lent it in opposition to the trust, and the other trustee permits that for ten years together, the question then turns upon this, not whether the receipt of the money was right, but whether the use of it subsequent to that receipt was right, after the knowledge of the trustee that it had got into a course of abuse. As

(t) 11 Vés. 319.

soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it." The conclusion was that Mooring was to be made answerable.

Walker v. Symonds (u) involved great particularity of circumstances, but, Lord Eldon having described it as a case of great importance to trustees in general (x), it may be useful to state it so far as it bears upon the present subject.

A sum of money secured by mortgage had been assigned to Donnythorne, Griffith, and Symonds, upon certain trusts. On the 12th of January 1791 the mortgage was paid off and the estate re-conveyed and a joint receipt signed, and the money with the approbation of the co-trustees was put into the hands of Donnythorne. The money was shortly afterwards invested by Donnythorne, with the sanction of his co-trustees, in bills or notes of the East India Company payable at the end of two years. In 1795 the bills were paid off by the Company and the money received by Donnythorne. Intelligence to that effect having been transmitted to the co-trustees, Symonds the same year wrote to Donnythorne requesting him to invest it in the public funds in the joint names of the trustees. Donnythorne begged that the money might remain in his hands, and proposed to secure the repayment of it by a mortgage from himself and his son of their settled estates in Cornwall, and, until the mortgage could be prepared, to secure it by their joint bond. The co-trustees, conceiving the security would be ample, expressed their consent, and the joint bond was accordingly executed. Donnythorne not having

(u) 3 Sw. 1.

(x) Id. 74.

sent the mortgage as he had promised, Symonds made several applications to him upon the subject, earnestly desiring him either to invest the money in the funds or to give them landed security. In September 1796 Donnythorne died insolvent, and without having executed the mortgage. Sir W. Grant observed, "The money in 1791 was paid in without any act of the trustees: they were obliged to receive it: so far they were blameless. It came to Donnythorne's hands, and the trustees were not to blame in letting it come to his hands; but they might have afterwards made themselves responsible by merely not doing what was incumbent on them; by permitting the money to remain a considerable time in the hands of their co-trustee they might, without any positive act on their part, have made themselves liable. That will depend on the degree and extent of their *laches* in suffering the money to remain in the hands of Donnythorne. The trustees being authorised to put the money out on mortgage, it would be rather hard to say that they were guilty of *laches* by giving Donnythorne a little time to find a mortgage, taking his bond in the mean time. What passed in the interval between to the death of Donnythorne does not appear. If it were necessary to decide the point, an inquiry before the Master must be directed (y)." Sir W. Grant came to his decision (which acquitted the trustees,) upon entirely different grounds; but Lord Eldon, before whom the cause was brought upon appeal, reversed Sir W. Grant's decree, and directed an inquiry by the Master as to the conduct of the trustees from January 1791, when the mortgage was paid off, to 1796, the time of Donnythorne's death. It then appeared by the Master's report made in pursuance of the order, that

(y) 3 Sw. 41.

the money had been invested by Donnythorne, soon after he had received it, in East India bills *payable to himself*· that the money due on the bills had been discharged in 1793, and the money paid to Donnythorne ; that the co-trustees had made no inquiry about the trust-fund from January, 1791, till May, 1795, which was the time when Symonds wrote the letter and made the applications already stated. On the hearing of the cause upon further directions Lord Eldon said, “ The cause comes back with a report stating a clear breach of trust in leaving the trust-fund in the situation represented from 1791 to 1793, and from 1793 to 1795. The money was laid out in 1791 with the consent of the trustees in India bills payable to Donnythorne, a palpable breach of trust by placing the fund under his control secured by little more than a promissory note payable to himself. It was probable that in 1793 Donnythorne would be paid the money due on the bills, and it would be lodged in his hands ; and although the Court will proceed as favourably as it can to trustees who have laid out the money on a security from which they cannot with activity recover it, yet no Judge can say they are not guilty of a breach of trust, if they suffer it to lie out on such a security during so long a time (z). The trustees were guilty of a breach of trust in permitting the money to remain on bills payable to Donnythorne alone, and in leaving the state of the funds unascertained for five years (a). I agree with the Master of the Rolls that inquiry *might*, on the principles of this Court, have discharged the trustees in given circumstances from a breach of trust. If, without previous participation, they in June 1795 had found that,

(z) 3 Sw. 65.

(a) Id. 67.

being themselves implicated in no breach of trust, they had a co-trustee who had been guilty of a shameful violation of his duty, and immediately exerted themselves to obtain from him a mortgage, which was their object at that time, and used their utmost efforts instead of filing a bill in this Court which perhaps might have destroyed his means of giving security, I should have hesitated long before I charged them, if inquiry had satisfied me that for a simple contract debt due to them they had taken a bond and a mortgage instead of instituting a suit, with the rational hope that by means of the bond and the mortgage they should obtain payment from their co-trustee (b).” The result of his Lordship’s judgment was, that, under the circumstances disclosed by the Master’s report, the trustees were clearly to be held responsible for the loss of the money.

Again, in the more recent case of *Bone v. Cook* (c) an estate had been disposed of by certain trustees for sale, and the purchase-money was received by one of them, and retained in his hands. The other trustees paid no attention to the matter for a period of two years, but at the end of that time they called upon their co-trustee to make an investment. This he was unable to do, but executed a mortgage of some real estate, and gave them a warrant of attorney. The trustee afterwards became bankrupt, and a loss of nearly 400*l.* was incurred, and the co-trustees were called upon to make good the amount.

The case of *co-executors* is very materially different from that of co-trustees. An executor has, independently of his co-executor, a full and absolute control over the personal assets and rights of the testator. If an executor

(b) 3 Sw. 71.

(c) M’Clel. 168.

join with a co-executor in a receipt, he does a wanton and unnecessary act; he interferes when the nature of the office lays upon him no such obligation, and therefore it was a rule very early established, that, if executors joined in receipts, they should be answerable, each *in solido*, for the amount of the money received (*d*).

In *Westley v. Clarke* (*e*) Lord Northington expressed an opinion that aimed at breaking down the rule; and by his decision of that case he succeeded so far as to establish a qualification of it.

Thompson, one of three co-executors, had called in a sum of money secured by a mortgage for a term of years, and received the amount, and *afterwards*, but the same day, sent round his clerk to his co-executors with a particular request that they would execute the assignment and sign the receipt, which they accordingly did. Thompson afterwards became bankrupt, and the money was lost, and thereupon a bill was filed to charge the co-executors. Lord Northington said, "The rule that executors joining in a receipt are all liable amounts to no more than this, that a joint receipt given by executors is a *stronger* proof that they actually joined in a receipt, because generally

(*d*) *Aplyn v. Brewer*, Pr. Ch. 173; *Murrell v. Cox*, 2 Vern. 570; *ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Leigh v. Barry*, 3 Atk. 584, *per eundem*; *Harrison v. Graham*, 3 Hill's MSS. 239, *per eundem*, cited 1 P. W. 241, 6th ed. note (*y*).

(*e*) 1 Ed. 357; and see *Harden v. Parsons*, 1 Ed. 147, 148. Yet in *Churchill v. Hobson*, 1 P. W. 241, note (1) by Mr. Cox, his

Lordship is reported to have said, according to a note of the case by Sir L. Kenyon, that in *Westley v. Clarke* he should have thought the co-executors liable if they had been present at the time the money was paid; and Lord Redesdale in *Doyle v. Blake*, 2 Sch. & Lef. 242, 243, seemed to think that Lord Northington had no intention of *breaking down*, but only of *qualifying* the rule.

they have no occasion to join for conformity. But, if it appears plainly that one executor only received and discharged the estate indebted and assigned the security, and the others joined afterwards without any reason, and without being in a capacity to control the act of their co-executor either before or after that act was done, what grounds has any Court in conscience to charge him? Equity arises out of a modification of *acts*, where a very minute circumstance may make a case equitable or iniquitous; and though former authorities may and ought to bind the determination of subsequent cases with respect to *rights*, as in the right of curtesy or dower, yet there can be no rule for the future determination of this Court concerning the *acts* of men. The only act that affected the assets was the first that discharged the debt, and, according to the sense of the Bar, transferred the legal estate of the lands. Then *that* the co-executors are not to answer for, and the second is nugatory." His Lordship was therefore of opinion that the co-executors were not liable for the misapplication by the co-executor.

The doctrine propounded in this case, that the joint receipt of co-executors is merely a stronger proof of the actual receipt than in the instance of co-trustees, and that an executor as well as a trustee may rebut the presumption by positive evidence, has since been repeatedly contradicted both by *dicta* and decisions (*f*). The simple point determined, viz., that an executor who signs shall

(*f*) *Scurfield v. Howes*, 3 B. C. C. 90; *Sadler v. Hobbs*, 2 B. C. C. 114; *Langford v. Gascoyne*, 11 Ves. 333; and see *Doyle v. Blake*, 2 Sch. & Lef. 243; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 325; *Shipbrook v. Hinchinbrook*, 16 Ves. 479; *Walker v. Symonds*, 3 Sw. 64.

not be answerable when the act of signature is nugatory, may be considered as now settled.

Lord Thurlow, indeed, is reported to have questioned the decision in *Westley v. Clarke* (g), but Lord Alvanley said, "he must enter his dissent against the rule, that executors joining in a receipt were both liable, for he did not hold that an executor could not *in any case* be discharged from a receipt given for conformity: he did not find fault, for instance, with the case of *Westley v. Clarke* (h)." And, again, he said, "he perfectly concurred in the decision of that case, and the joining in a receipt, though not perhaps absolutely necessary, he would not consider *conclusive* (i)." Lord Eldon, in evident allusion to the case of *Westley v. Clarke*, admitted the old rule had been *pared down*, at the same time expressing his opinion that the notion upon which the later cases had proceeded, that the old rule had a tendency to discourage executors from acting, was very ill-founded. A plain general rule, he thought, which once laid down was easily understood and might be generally known, was much more inviting to executors than a rule referring every thing to the particular circumstances (k).

The present doctrine of the Court was thus enun-
tiated by Lord Eldon:—"Though one executor has
joined in a receipt, yet whether he is liable shall depend
upon his *acting*. The former was a simple rule that *join-
ing* should be considered as *acting*, but now *joining alone*

(g) *Sadler v. Hobbs*, 2 B. C. C. 117.

(h) *Scurfield v. Howes*, 3 B. C. C. 94.

(i) *Hovey v. Blakeman*, 4 Ves. 608.

(k) See *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 325; *Shipbrook v. Hinchinbrook*, 16 Ves. 479; *Walker v. Symonds*, 3 Sw. 64.

does not impose responsibility (*l*).” The same rule was laid down by Lord Redesdale, and in his usual clear and forcible language. “The distinction,” he said, “with respect to mere signing appears to be this ; that if a receipt be given for the purposes of form, then the signing will not charge the person not receiving ; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such receipt shall charge. Thus, where two executors join in a receipt to a debtor, though the receipt of one would have been a discharge to the debtor, yet, they joining in the discharge, the debtor is taken to have paid to them both. His requiring the discharge of the executor who has not received the money amounts to saying, ‘I make this payment to you both, and not to him only who actually receives the money.’ If it was so considered by the person paying the money, then the joining in the receipt by the person who did not actually receive amounted to a direction to pay to his co-executor, (for it could have no other meaning,) and he became responsible for the money, just as if he had actually received it (*m*).”

In *Churchill v. Hobson* (*n*) Lord Harcourt took a distinction between creditors and legatees (*o*) ; that in the case of creditors, who were entitled to the utmost benefit of the law, the joining of the executors in the receipt might make each liable for the whole ; but when legatees were concerned, who had no remedy for their demand except in equity, it was altogether unequitable,

(*l*) *Walker v. Symonds*, 3 Sw. 2 Sch. & Lef. 242.

64.

(*n*) 1 P. W. 241.

(*m*) *Joy v. Campbell*, 1 Sch. & Lef. 341 ; and see *Doyle v. Blake*,

(*o*) See *Gibbs v. Herring*, Pr. Ch. 49.

that one executor should answer for the receipt of the other. But this refinement of Lord Harcourt has by subsequent authorities been clearly overruled (*p*). The comment of Lord Northington, though it may not express faithfully the distinction intended by Lord Harcourt, is too ingenious not to be here mentioned. "At law," he said, "a joint receipt is conclusive evidence that the money came to them both, and is not to be contradicted; but a Court of Equity, which rejects estoppels and pursues truth, will decree according to the justice and verity of the fact; and what is said by Lord Harcourt as to the distinction between a receipt of this kind as to a legatee and a creditor seems to have this meaning—that a creditor may at law charge both executors on a joint receipt, but that in a Court of Equity, where alone legacies are received, such receipt should not be conclusive, but the Court will see who actually received, and charge that person accordingly (*q*)."

Lord Redesdale has rightly observed, that "there *may* be a case, where executors would be charged as against creditors, though not as against legatees, for legatees are bound by the terms of the will, creditors are not; and therefore, if the testator direct the executors to collect the assets, and pay the proceeds into the hands of A. which is done accordingly, and A. fails, if a creditor remain unpaid, he may charge the executors; but, as regards a legatee, the executors may justify themselves by the directions of the will (*r*)."

On the same principle that an executor is liable for

(*p*) See *Sadler v. Hobbs*, 2 B. 147.

C. C. 117; and see *Doyle v. Blake*, (r) *Doyle v. Blake*, 2 Sch. & 2 Sch. & Lef. 239. Lef. 239, 245.

(*q*) *Harden v. Parsons*, 1 Ed.

joining in a receipt he is responsible for any act by which he reduces part of the testator's property into the possession of his co-executor ; as if an executor join in drawing (*s*), or indorsing (*t*), a bill. So it is laid down in an old case, that "if by agreement between the executors one be to receive and intermeddle with such a part of the estate, and the other with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both (*u*)."
So an executor is answerable, if he give a power of attorney, or other authority, to his co-executor, and, *a fortiori*, if to a stranger, to collect the assets (*x*).

But under particular circumstances the joining of an executor is as absolutely necessary as the joining of a trustee, and of course in such cases executors and trustees are put upon the same footing in respect of liability.

Thus, if a bill of exchange be remitted to two agents payable to them personally, who on the death of their principal are made his executors, the mere indorsement of one, after they are executors, in order to enable the other to receive the money, will not operate to charge him who does not actually receive (*y*).

And so where the joining of both executors is necessary to the transfer of stock (*z*).

(*s*) *Sadler v. Hobbs*, 2 B. C. C. 114.

(*t*) *Hovey v. Blakeman*, 4 Ves. 608, *per* Lord Alvanley.

(*u*) *Gill v. Attorney-General*, Hard. 314.

(*x*) *Doyle v. Blake*, 2 Sch. & Lef. 231; *Lees v. Sanderson*, 4 Sim. 28; *Kilbee v. Sneyd*, 2 Moll. 200, *per* Sir A. Hart.

(*y*) *Hovey v. Blakeman*, 4 Ves. 608, *per* Lord Alvanley.

(*z*) *Chambers v. Minchin*, 7 Ves. 197, *per* Lord Eldon; *Shipbrook v. Hinchinbrook*, 11 Ves. 254; *S. C.* 16 Ves. 479, *per eundem*; see *Murrell v. Cox*, 2 Vern. 570, and compare *Scurfield v. Howes*, 3 B. C. C. 94; note, the doctrine at the period of the last case had not been settled.

But where the joining of an executor is absolutely indispensable, it is still incumbent on the executor to see that the act in which he joins is perfectly consistent with the due execution of the trust (*a*).

And the executor will not be excused if he rely on the mere representation of his co-executor as to the necessity or propriety of the act, for the executor has imposed upon him at least ordinary and reasonable diligence to inquire whether the representation is true (*b*).

And if, at a period when in the ordinary course of administration the debts should long since have been discharged, an executor is applied to by his co-executor to join in a transfer of stock for the purpose of payment of debts, and the executor does inquire, and ascertains there are such debts, but afterwards it turns out the co-executor had in his hands a fund sufficient for the payment of the debts, in such a case the executor who joins in the receipt is liable to the imputation of negligence for not having acquainted himself how the co-executor had dealt with the assets during the preceding period, and is liable for the application of the money he enables the co-executor to receive (*c*).

And the executor will be answerable if he leave the money, as for two years, in the hands of the executor, when by the terms of the trust it ought to be invested on proper securities (*d*).

But an executor will not be called upon to replace so

(*a*) *Chambers v. Minchin*, 7 Ves. 186; *Shipbrook v. Hinchinbrook*, 11 Ves. 252; *Underwood v. Stevens*, 1 Mer. 712; *Bick v. Motly*, 2 M. & K. 312. (*c*) *Shipbrook v. Hinchinbrook*, 11 Ves. 254, per Lord Eldon; *Bick v. Motly*, 2 M. & K. 312. (*d*) *Scurfield v. Howes*, 3 B. C. C. 91. (*b*) *Shipbrook v. Hinchinbrook*, 11 Ves. 252, see 254; *Under-*

much of the fund as it can be proved the co-executor *bonâ fide* expended toward the purposes of the trust (*e*).

The rules respecting co-executors are equally applicable to co-administrators. Lord Hardwicke once expressed an opinion, that joint administrators resembled rather co-trustees, and that any one of them could not exercise the office without the concurrence of the rest (*f*); but it was afterwards determined in the court of King's Bench, that joint administrators and co-executors stood in this respect precisely on the same footing (*g*).

To return to the liabilities of co-trustees, if one trustee be conusant of a breach of trust committed by another, and either industriously conceal it (*h*), or do not take active measures for the protection of the *cestui que trust's* interest (*i*), he will himself become responsible for the mischievous consequences of the act. A trustee is called upon, if a breach of trust be *threatened*, to prevent it by obtaining an injunction (*k*), and, if a breach of trust has been *already committed*, to file a bill for the restoration of the trust fund to its proper condition (*l*), or, at least, to take such other active measures, as, with a due regard to all the circumstances of the case, may be considered the most prudential (*m*).

(*e*) *Shipbrook v. Hinchinbrook*, C. C. 68.

11 Ves. 252; *S. C.* 16 Ves. 477; *Kilbee v. Sneyd*, 2 Moll. 213, *per* Sir A. Hart; *Underwood v. Stevens*, 1 Mer. 712; and see *Brice v. Stokes*, 11 Ves. 328.

(*f*) *Hudson v. Hudson*, 1 Atk. 460.

(*g*) *Willand v. Fenn*, cited *Jacomb v. Harwood*, 2 Ves. 267.

(*h*) *Boardman v. Mosman*, 1 B.

(*i*) *Brice v. Stokes*, 11 Ves. 319; and see *Walker v. Symonds*, 3 Sw. 41; *Oliver v. Court*, 8 Price, 166; *in re Chertsey Market*, 6 Price, 279.

(*k*) See *in re Chertsey Market*, 6 Price, 279.

(*l*) *Franco v. Franco*, 3 Ves. 75.

(*m*) See *Walker v. Symonds*, 3 Sw. 71.

An express clause is usually inserted in trust-deeds, that one trustee shall not be answerable for the receipts, acts, or defaults of his co-trustee. But the proviso, while it informs the trustee of the general doctrine of the Court, adds nothing to his security against the liabilities of the office. In *Westley v. Clarke* (n) Lord Northington was inclined to attach some importance to the clause. "The testator," he said, "might direct the condition of his executors so as not to be questioned by his volunteers. The proviso, therefore, that one executor should not be answerable for the acts of another, though not very frequent in wills, was a good proviso between executors and legatees who took under the will." But equity infuses such a proviso into every trust-deed (o), and a party can have no better right from the expression of that which, if not expressed, had been virtually implied (p). It is clear, that, in later cases, the Court has considered it an immaterial circumstance whether the instrument creating the trust contained such a proviso or not (q).

VI. It is a general rule established to keep trustees in the line of their duty, that they shall not derive any the least *advantage* from the administration of the property committed to their charge (r). It was upon this principle that Lord Eldon once directed an inquiry, whether the liberty of *sporting* over the trust estate could be

(n) 1 Ed. 360.

(o) See *Dawson v. Clarke*, 18 Ves. 254.

(p) *Worrall v. Harford*, 8 Ves. 8.

(q) *Brice v. Stokes*, 11 Ves. 319; *Bone v. Cook*, M'Clel. 168; *Hanbury v. Kirkland*, 3 Sim. 265.

(r) *Burgess v. Wheate*, 1 Ed. 226, per Lord Mansfield; Id. 251,

per Lord Henley; *O'Herlihy, v. Hedges*, 1 Sch. & Lef. 126, per Lord Redesdale; *ex parte Andrews*, 2 Rose, 412, per Sir T. Plumer; *Middleton v. Spicer*, 1 B. C. C. 205, per Lord Thurlow; *Docker v. Somes*, 2 M. & K. 664, per Lord Brougham.

let for the benefit of the *cestuis que trust*, and, if not, he thought the game should belong to the heir; the trustee might appoint a gamekeeper, if necessary for the preservation of the game, but not to keep up a mere establishment of pleasure (*s*). So, if an advowson be devised to trustees upon trust to sell, and, before the sale has been effected, a vacancy occurs, the right of presentation is not to be exercised by the trustee at his own pleasure, but he must adopt the nomination of the testator's heir at law (*t*).

So, if trustees or executors buy in any debt or incumbrance to which the trust estate is liable for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the other creditors and legatees shall have the advantage of it; and, if there be no such claimants, it shall go to the party who is entitled to the surplus (*u*).

A mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's right of dower, and it was decreed that the heir of the mortgagor, on bringing his bill to redeem, might take the purchase at the price paid, on the ground that the mortgagee, after receipt of his money, was but a trustee for the mortgagor (*x*).

So, if trust money be laid out by a trustee in buying and selling land, and a profit be made by the transaction, that shall go, not to the trustee who has so applied the money,

(*s*) *Webb v. Earl of Shaftesbury*, 7 Ves. 480, see 488. 628, per Lord Eldon; *Morret v. Paske*, 2 Atk. 54, per Lord Hardwicke.

(*t*) See *Hill v. Bishop of London*, 1 Atk. 618.

(*x*) *Baldwin v. Banister*, cited

(*u*) *Robinson v. Pett*, 3 P. W. 251, note (A); *Darcy v. Hall*, 1 Vern. 49; *ex parte Lacey*, 6 Ves.

Robinson v. Pett, 3 P. W. 251 note (A).

but to the *cestui que trust* whose money has been applied (*y*). So, where a trustee or executor has used the fund committed to his care in stock speculations, though any loss must fall exclusively upon himself, he must account to the trust estate for every farthing of profit. If he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person from which he is to derive certain stipulated gains (*z*), or if he employ it himself for the purposes of his own business, in all these cases he must account to the *cestui que trust* for the profits (*a*).

And the principle applies not only to express trustees, but also to such as are clothed with the same character by construction of law, as if a person purchase an estate with another's money, or invest another's property in some trade or speculation. So, an attorney, guardian, or other person invested with a fiduciary character, must account for all profits to the client, or infant, or other party whose confidence he has abused (*b*).

However, a trustee may by *possibility* derive a benefit from the trust estate, not from any positive right in himself, but from the want of right in any other; as if lands be vested in A. and his heirs upon trust for B. and his heirs, and B. die without an heir, the equitable interest in this case can neither escheat to the lord (*c*), nor, if the seisin of B. was *ex parte paternâ*, can, upon failure of heirs in that line, descend to the heir *ex parte maternâ* (*d*); but the trustee, no person remaining to sue

(*y*) *Fosbrooke v. Balguy*, 1 M. & K. 226.

(*b*) *S. C.* Id. 665.

(*z*) *Docker v. Somes*, 2 M. & K. 664, *per* Lord Brougham.

(*c*) *Burgess v. Wheate*, 1 Ed.

177.

(*a*) *S. C.* Id. 665.

(*d*) See Id. 186, 216, 256.

a subpoena, must, as the legal proprietor, himself enter upon the beneficial enjoyment. Lord Hale was clearly of this opinion, and compared it to the case of the grantee of a rent charge in fee dying without heirs, when the tenant of the land should hold it discharged of the rent (*e*). In *Burgess v. Wheate* Sir Thomas Clarke said he would give no opinion on the right of the trustee, but at the same time admitted the trustee must hold until a better right appeared (*f*). Lord Henley seemed to entertain no doubt upon the subject, and considered Lord Hale's illustration by the extinguishment of a rent as a sufficient answer to the objection of want of title in the trustee (*g*).

It seems to follow from the same principle, that, where a purchaser has paid the consideration money, and then dies without an heir before the execution of the conveyance, the vendor must keep both the estate and the money (*h*).

Should a mortgagor in fee die and leave no heir, the questions may be asked: first, shall the mortgagee hold the estate absolutely? and, secondly, if the mortgagee demand his debt of the personal representative, shall he take to himself both the land and the debt? "If the mortgagor," observed Sir Thomas Clarke, "dies without heir or creditor, I see no inconvenience if the mortgagee do hold the estate absolutely; and as to the supposition that the mortgagee may demand his debt too, I think, if the mortgagee took his remedy against the personal representative, the Court would compel him to reconvey, not to the lord by escheat, but to the personal representative, and would consider the estate reconveyed as coming in

(*e*) *Attorney-General v. Sands*,
Hard. 496.

(*g*) Id. 253.

(*h*) Id. 211, *per* Sir T. Clarke.

(*f*) 1 Ed. 212, 213.

lieu of the personalty, and as assets to answer even simple contract creditors (*i*).” Lord Mansfield said, “He could not state on any ground established what would be the determination in that case (*k*).” Lord Henley observed, “The lord has his tenant and services in the mortgagee, and he has no right to any thing more. Perhaps it would not be difficult to answer what would be the justice of the case, but it is not to the business in hand (*l*).”

But escheat may not only happen by failure of heirs on the *decease* of the *cestui que trust*, but also on failure of heirs by his *attainder for felony*; and in the latter case the question arises, shall the trustee hold against the felon if pardoned, or against the heir of the felon if executed? Sir Thomas Clarke said, “The detaining the estate against the Crown where the *cestui que trust* dies without leaving a relation is different from detaining it against the *cestui que trust* himself. The Court would go as far as it could, and he thought the trustee would be estopped from setting up such a claim (*m*).” Lord Mansfield said, “He could not resolve the case upon principle, for he could find no clear and certain rule to go by (*n*).” But Lord Henley agreed with Sir Thomas Clarke, and asked, “If the King thinks proper to pardon the felon, what hinders him from suing his trustee?—what hinders him from instantly assigning his trust for the benefit of his family? (*o*).” However, if trusts are to follow the analogy of uses, it seems the *heir* of the felon cannot sue his *subpæna* by reason of the corruption of blood (*p*).

(*i*) 1 Ed. 210.

(*k*) Id. 236.

(*l*) Id. 256.

(*m*) Id. 210.

(*n*) Id. 236; and see Id. 184.

(*o*) Id. 255.

(*p*) Br. Feff. al. Us. 34; Carey,

14.

A question was put by Lord Mansfield in *Burgess v. Wheate*, but was neither answered at the time, nor received any notice from the bench afterwards, viz. whether the right to the estate might not, in particular cases, result to the *creator* of the trust (*q*). As, if A. infeoff B. and his heirs upon trust for C. and his heirs, and C. die without heirs, why may not the equitable interest result in favour of A.? Such a case has never occurred, and there is no authority upon the subject; but the claim of A. upon principle appears at least to have some plausibility.

As the trustee in these cases advances not a positive, but merely a negative claim, he has no ground for coming into a court of equity for the establishment of his right (*r*). Thus, where A. devised a copyhold estate to B. and his heirs in trust for C. and his heirs, and C. died without heirs, and then B. died, having entered upon the lands, and applied the rents to the trust, but never having been admitted, and the heir of B. filed a bill against the lord for compelling him to grant him admission, Lord Loughborough said, "The ground for the Court's acting between the lord and tenant is, that the lord *de jure* may call upon the tenant to be admitted if he stands out, for he has a right to the fine and his services; and the Court would not let the parties stand in this situation, that the lord who had his remedy against the tenant should, by refusing to call upon him, prevent him from having evidence of his title under the lord upon the rolls, which are in the lord's keeping. The Court acts in this case upon the ground of the tenant's having the beneficial interest in the land, but is there any instance of a bill sustained upon a mere legal title for an accessory to the

(*q*) 1 Ed. 185.

(*r*) See 1 Ed. 212.

legal estate? If the admission be a legal duty, I do not know what I have to do with it. *Burgess v. Wheate*, supposing it well decided, established, that, if a man had got the legal estate, the Court would not take it from him, except for some person who had a claim; but does it follow that the Court will *give* him the legal estate? (s)."

As courts of law have no conusance of any but legal rights, it should seem a *mandamus* might be issued from the King's Bench for compelling the admission even of a bare trustee (t).

If the *cestui que trust* of *chattels*, whether *real or personal*, die without leaving any *next of kin*, the beneficial interest will not, in this case, remain with the trustee, but like all other *bona vacantia* will vest in the King by his prerogative (u).

(s) *Williams v. Lord Lonsdale*, *Wilson*, 10 B. & C. 80.

3 Ves. 752; see 756, 757.

(u) *Middleton v. Spicer*, 1 B. C.

(t) See *King v. Coggan*, 6 East, C. 201; *Barclay v. Russell*, 3 431; *S. C.* 2 Smith, 417; *King v.* Ves. 424.

CHAPTER XVI.

THE DUTIES OF TRUSTEES OF CHATTELS PERSONAL.



WE next advance to the *duties* of trustees, and as trusts of chattels personal are of the most frequent occurrence, we may first advert to trustees of property of this description. We may distribute this branch of our subject under four heads: 1. The reduction of the chattel into the possession of the trustee. 2. The safe custody of it. 3. The proper investment of the trust fund. 4. The due application of it to the purposes of the trust.

I. Of reduction into possession.

The first duty of the trustee is to place the trust property in a state of security: it is therefore imposed upon the trustee of a *chose en action* to be active in getting in the outstanding estate; and any unnecessary delay in this respect will be at his own personal risk.

Thus, in *Caffrey v. Darby* (a) a woman, in contemplation of a second marriage, had assigned a leasehold interest with stock in trade, household goods, &c., to trustees upon trust to raise 800*l.* to be applied to the purposes in the settlement mentioned, with a proviso that, so long as her intended husband should pay 100*l. per annum* until the

(a) 6 Ves. 488.

whole 800*l.* should be discharged, the trustees should allow him to remain in possession of the premises. In the course of the first four years the trustees were paid to the amount of 250*l.*, but by small instalments and at irregular periods, and received nothing afterwards. At the end of eight years the husband became bankrupt, and a great part of the 800*l.* was lost. Sir W. Grant said, " This was money payable by instalments, not a sum to be paid at once as a mortgage is, and secured too partly upon an estate daily diminishing in value, a short lease for 25 years commencing three years before the settlement, and upon stock in trade, &c., a sort of property very uncertain in its nature. From these two considerations, the diminishing value of the property and the mode of payment by instalments, I am of opinion the trustees were not justified in any great indulgence, for it was evident the debtor's inability would be constantly augmenting. If he was unable to pay the first instalment, he must be still less able to pay the sums accumulated from permitting them to run together. The cases of payment by instalments and at once are quite different. In the latter the debtor may be able to pay that sum to-morrow, or next year; but the chance of receiving money by instalments depends upon its being regularly received. Therefore, even though the trustees might not have been under the necessity of exacting from the husband the money on the precise day, yet they ought not to have given great latitude. They were hardly justifiable in permitting two instalments to become due; still less three; still less four. But here they permit him to remain four years in possession without receiving a shilling. That is evidence he was not prosperous: it did not turn out as well as he expected. It might be supposed that

he was running in debt with other people. The trustees might have expected a controversy with the creditors. They ought therefore to have taken some step for the security of the infant *cestuis que trust*, particularly when that is combined with the other circumstance that the property was diminishing in value." And his Honor decreed the trustees to make good the deficiency.

A testator had directed the money arising from his rents to be invested by his executors in the 3 per cent. Annuities for the purpose of accumulation. Arrears were incurred to the amount of 1,500*l*, and from the tenor of the Master's report it was evident, that, by the employment of proper means, the whole of the arrears might have been recovered. The executors produced no evidence in justification of their conduct. Sir Thomas Plumer said, " I am anxious not to discourage persons from acting as executors by throwing difficulties in their way, and am willing to make every proper allowance ; but I must not forget the established doctrine of this Court. *If persons accept the trust of executors, they must perform it ; they must use due diligence, and not suffer infants to be injured by their negligence. If there be CRASSA NEGLIGENTIA, and a loss sustained by the estate, it falls upon the executors.* Here, for want of evidence, I cannot say that all this rent could not have been recovered ; and I am reluctantly obliged to assume that no exculpatory evidence could be produced, and therefore they must be charged with these arrears. Interest upon the arrears was but faintly pressed for, and ought not to be given (*b*)."

An executor is not to allow the assets of the testator to

(*b*) *Tebbs v. Carpenter*, 1 Mad. 290.

remain outstanding upon *personal* security (*c*), though the debt was a loan by the testator himself on what he considered an eligible investment (*d*). And it will not justify the executor, if he merely apply for payment through his attorney, but do not follow it up by instituting legal proceedings (*e*).

But in a late case (*f*), where great part of the assets was outstanding on Mexican bonds, and the executors sold in the course of the second year from the testator's decease, it was held by Lord Cottenham, that, if executors were bound to convert the assets without considering how far it was for the interest of the persons beneficially entitled, there would of necessity be always an immediate sale, and often at a great sacrifice of property; that executors were entitled to exercise a reasonable discretion according to the circumstances of the particular case. The will had directed the trustees to convert "with all convenient speed," but this, observed his Lordship, was the ordinary duty implied in the office of every executor.

Money outstanding upon good *mortgage* security an executor is not called upon to realise until it be wanted in the course of administration (*g*). "For what," said Lord Thurlow, "is the executor to do? Must the money lie dead in his hands, or must he put it out on fresh securities? On the original securities he had the testator's confidence for his sanction, but on any new securities it will be at his own peril (*h*)".

(*c*) *Lowson v. Copeland*, 2 B. C. C. 156.

(*d*) *Powell v. Evans*, 5 Ves. 839; and see *Tebbs v. Carpenter*, 1 Mad. 298.

(*e*) *Lowson v. Copeland*, *ubi supra*.

(*f*) *Buxton v. Buxton*, 1 M. & C. 80.

(*g*) *Orr v. Newton*, 2 Cox, 274; and see *Howe v. Earl of Dartmouth*, 7 Ves. 150.

(*h*) *Orr v. Newton*, 2 Cox, 276.

II. As to the safe custody of the chattel.

Lord Northington once observed, "No man can require or with reason expect that a trustee should manage his property with the same care and discretion that he would his own (*i*)," but the maxim has never failed, when mentioned, to incur strong marks of disapprobation. A trustee is called upon to exert precisely the *same* care and solicitude in behalf of his *cestui que trust* as he would do for himself; but *greater* measure than this a court of equity will *not* exact (*k*).

A trustee, in an old case, had kept 40*l.* of trust money in his house, and 200*l.* belonging to himself, and was robbed of both by his servant, and he was held not to be responsible (*l*).

An administratrix had left goods with her solicitor to be delivered to the party entitled. The articles were stolen, and the Court said it was the same as if they had been in the custody of the administratrix, and it was too hard to charge her with the loss (*m*).

If the subject of the trust be money, it may safely and most properly be deposited in some responsible banking-house (*n*); but the trustee will make himself liable for

(*i*) *Harden v. Parsons*, 1 Ed. 148.

(*k*) *Morley v. Morley*, 2 Ch. Ca. 2, *per* Lord Nottingham; *Jones v. Lewis*, 2 Ves. 241, *per* Lord Hardwicke; *Massey v. Banner*, 1 Jac. & Walk. 247, *per* Lord Eldon.

(*l*) *Morley v. Morley*, *ubi supra*; and see *Jones v. Lewis*, 2 Ves. 241; *ex parte Belchier*, Amb. 220.

(*m*) *Jones v. Lewis*, 2 Ves. 240.

(*n*) *Rowth v. Howell*, 3 Ves. 565; *Jones v. Lewis*, 2 Ves. 241, *per* Lord Hardwicke; *Adams v. Claxton*, 6 Ves. 226; *ex parte Belchier*, Amb. 219, *per* Lord Hardwicke; *Attorney-General v. Randall*, 21 Vin. 534, *per* Lord Talbot; *Massey v. Banner*, 1 Jac. & Walk. 248, *per* Lord Eldon; *France v. Woods*, Taml. 172; *Lord Dorchester v. Earl of Effingham*, Id. 279.

the failure of the bank, if he do not guard against his own insolvency by paying in the money to the account of the trust estate, and not to his own credit.

A receiver transmitted two bills to a banker to be placed to his account, and in each bill the receiver's own money was mixed up with the trust-fund. The bank failed, and Lord Eldon decreed the receiver to make good the loss. "A receiver," he said, "cannot be allowed to say he is transmitting the money of the estate as such, if he permit it to stand with his own money to his own credit; for, in that case, if any intermediate failure of the receiver happen, *his* estate gets the benefit of the remittance, and the trust estate none. Then, on the failure of the bank, I will not permit him to say he shall not suffer the loss, but the trust estate shall suffer it (*o*)."

And in the more recent case of *Massey v. Banner* (*p*), where A. and B. were trustees for creditors, and C. acted for them in collecting the debtor's estate, and paid the assets into a bank to his own account, and, on the failure of the bank, A. and B. filed a bill against C. to compel him to account for the loss, Lord Eldon said, "C. is liable in the same manner as other persons acting as trustees, executors, receivers, or assignees; and the principle applying to all these classes of persons is properly expressed in these terms—That the Court does not expect them to take *more* care of the property entrusted to them than they would do of their own. If a receiver of the Court undertake to receive rents in the country he cannot send them in cash, and if he collect them in paper, taking the same care with respect to it as a reasonable

(*o*) *Wren v. Kirtton*, 11 Ves. *Walker*, 3 Mad. 73.
377, see 380; and see *Fletcher v.* (*p*) 1 Jac. & Walk. 241.

attention to his own affairs would dictate to him if it was for himself, if he remits what he has collected by the best bills he can find by the same means that would be reasonable if it were on his own account, then I should say that it would be very difficult to charge him, for he has done the best he could for his employers. But I cannot persuade myself that the principle is satisfied, unless the result is as beneficial to them as it would be to himself. If an assignee pays money into his banker's hands as money belonging to the estate, and the banker fails, the assignee is undoubtedly clear from the loss; but if, instead of distinguishing it, he pays it all in to his own account, then it is his account there; there is nothing like a declaration of trust of it, and it is familiar to consider him as having it in the banker's hands for himself, making him liable for it, and charging him with interest at the rate (since the late statute) of 20*l.* per cent. This is because, if he had become bankrupt, it would have gone to the credit of his estate; for it is clear in that case, that, if the bankers had any account with him by way of set-off, that set-off would affect equally his money and the money of the estate paid in to his account: they have no notice that it belongs to the estate: the account is between him and them. The same has been the case with executors and trustees; and I apprehend, that, for the safety of mankind, the principle must be, that, if you desire to deal for me as you would for yourself, it must be so that the dealing for me, if unfortunate, shall not be more so to me than it would have been to you, if it had been for yourself. In the case of the assignee, if he fails, his estate has all the benefit of the money: the parties for whom he acts have none: he does not therefore deal for them as he would for himself. Now, what is this case?

There seems to have been the same course of dealing between C. and the bankers from his beginning to act as collector down to the bankruptcy, as there was previous to the commencement of his agency: the whole account is kept with himself, and though he did not draw during the latter part of the period, yet he might have drawn as freely as before: the account stood in the same way, and it seems to me that he had the same authority and control over it. See what the consequence is: if he had paid the sums in question to the account of the trust estate, and the bankers had then become bankrupts, undoubtedly the trustees would have been entitled to prove the sum against them. Even now that it is standing in his name, the trustees might be entitled to prove it by his confession that it belonged to the trust estate, and then they would be in the same situation. But this will not be a ground for discharging him, unless it be laid down that the liability of a trustee shall depend on his being solvent; for, if he were capable of becoming a bankrupt, his assignees would take the debt due from the bankers, or, if he were to die insolvent, it would be part of his assets; and, in either case, the trust estate would not have the benefit of the proof." His Lordship therefore held that C. was responsible.

And a trustee must not lodge the money in such a manner as to *put it out of his own control*, though it be not under the control of another. White, a receiver, in order to induce Adams and Burlton to become his sureties, entered into an arrangement with them, that the rents, as received, should be deposited in a bank in the joint names of the sureties, and that all drafts should be in the *handwriting* of Anderson, who was Adams's partner, and should be *signed* by White. An account was

opened upon this footing : the bank failed ; and a considerable loss was incurred. Sir J. Leach held that the receiver and his sureties were not to be answerable (*q*), but his Honor's decision was reversed on appeal by the Lord Chancellor (*r*), and the reversal was afterwards affirmed on the final appeal, by the House of Lords (*s*). On the latter occasion Lord Brougham observed, " It is clearly the duty of a receiver, as an officer of the Court, to keep in his own hands the control over the fund. It is admitted, that, if he had parted altogether with that control, he would have been answerable, whether the loss actually incurred could be traced to and connected with that severance and that want of power over the fund or not. Does it make any difference, that, instead of *entirely* parting with the control, he gave a *veto* on all his dealings with it to a mere stranger ? Anderson was wholly unknown to the Court, which reposed its confidence in its own officer, and looked only to him : the acts of a stranger it had no power over, and could in no respect control. Consider the position of the fund, had a sudden run come upon the bank. White, on hearing it, would be bound, in the discharge of his official duty, instantly to draw the whole balance, and put it in a place of greater safety ; but the arrangement which he had made prevented him from doing this without the concurrence of Anderson, who lived at some distance, and who, even had he lived in the same town, might have been absent, or unable from illness to act, and who, had he been both on the spot and able to write the cheques, might have been unwilling and

(*q*) *Salway v. Salway*, 4 Russ.
60.

(*r*) 2 R. & M. 215.
(*s*) *Id.* 220.

refused. He might have been disposed to court the favour of his bankers at the risk of the estate; he might have drawn all his own money out, and recompensed the banker by leaving that of the receivership, and this without incurring the least risk himself; for he was not surety, nor in any way bound either to the Court or the receiver. Let us ask ourselves how any individual would like, during a run upon his banker, to have his hand paralysed by such a *veto* as was given to Anderson? What anxiety would he feel during the delay that must elapse in the interval between the run beginning and the messenger returning with the cheques filled up for his signature! Is a receiver entitled to place the custody or administration of the fund in a situation which, in the case of any individual dealing with his own estate, would be the source of such anxiety? No person in his own case would make such an engagement without extreme necessity or ample equivalent; and the least that can be required by the Court of its officers is that degree of diligence and care which any man would use in the conduct of his own affairs (t)."

In a case before Sir A. Hart, in Ireland, an executor was held to be justified, though he *had* placed the assets in a bank so as to be under the control of the co-executor. The money was entered in the books to the *joint* account of the co-executors, but the bank was in the habit of answering the cheques of either co-executor *singly*. "It is the custom of bankers," said Lord Chancellor Hart, "that what is deposited by one to the joint account may be withdrawn by the cheque of the other; and, for convenience of business, it is necessary this risk should be in-

(t) MS.

curred, for it would be very hard to transact business if every cheque should be signed by all the executors. The mode in which the account has been kept brings it, in effect, I admit, almost to the same thing as paying it directly to the co-executor; but each executor has full dominion, and may deal with the general fund as he thinks proper, without making his co-executor chargeable for a *devastavit* (u).” However, his Lordship admitted that “if there were any fraud or collusion, wilful default, or gross neglect, or if the executor had any reason to put a stop to the mismanagement by the co-executor, the case would be altered (x).” But even with this qualification the doctrine is so contrary to the principle of other cases that no trustee or executor could be advised to rely upon it in practice.

III. Where the trust money cannot be applied, either immediately or by a short day, to the purposes of the trust, it is the duty of the trustee to make the fund productive to the *cestui que trust* by the *investment* of it on some proper security.

It was the opinion of Lord Northington that a trustee might be justified in lending on personal credit. “The true touchstone,” he said, “by which the case is to be tried is, whether the trustee has been guilty of a breach of trust or not. If he has been guilty of a gross negligence, it is as bad in its consequences as a fraud, and is a breach of trust. The lending money on a note is not a breach of trust, without other circumstances *crassæ negligentiae* (y).” But the case from which this *dictum* is taken

(u) *Kilbee v. Sneyd*, 2 Moll. 186; see 200, 213. (y) *Harden v. Parsons*, 1 Ed. 148.

(x) *Id.* 203, 213.

has been called by Lord Eldon, from the extraordinary doctrines contained in it, "a curious document in the history of trusts (z)"; and certainly it is now indisputably settled that a trustee *cannot* lend on personal security (a). Lord Hardwicke said, "a promissory note is *evidence* of a debt, but no *security* for it (b)"; and Baron Hotham observed, that "lending on personal credit for the purpose of gaining a larger interest was a species of *gaming* (c)"; and Lord Kenyon said, that "no rule was better established than that a trustee could not lend on mere personal security, and it ought to be rung in the ears of every one who acted in the character of trustee (d)." And it will not alter the case that the money is lent on the *joint* security of *several* obligors (e).

Of course a trustee may lend on personal security, where he is expressly empowered to do so by the instrument creating the trust (f). But no such authority is communicated by a direction to place out the money at interest at the trustee's discretion (g), or on such good security as the trustee can procure, and may think safe (h). And if joint trustees be empowered to lend on

(z) *Walker v. Symonds*, 3 Sw. 62. *Reddington*, 5 Ves. 799; *Collis v. Collis*, 2 Sim. 365.

(a) *Adye v. Feuillateau*, 1 Cox, 24; *Holmes v. Dring*, 2 Cox, 1; *Terry v. Terry*, Pr. Ch. 273; *Ryder v. Bickerton*, cited *Harden v. Parsons*, 1 Ed. 149, note (a); and more fully *Walker v. Symonds*, 3 Sw. 80, note (a);

(b) *Ryder v. Bickerton*, cited *Walker v. Symonds*, 3 Sw. 81, note (a).

Vigrase v. Binfield, 3 Mad. 62; *Walker v. Symonds*, 3 Sw. 63; *Keble v. Thompson*, 3 B. C. C. 112; *Wilkes v. Steward*, Coop. 6; Loft, 492; and see *Pocock v.*

(c) *Adye v. Feuillateau*, 1 Cox, 25.

(d) *Holmes v. Dring*, 2 Cox, 1.

(e) *S. C.*

(f) See *Forbes v. Ross*, 2 B. C. C. 430; *S. C.* 2 Cox, 113.

(g) See *Pocock v. Reddington*, 5 Ves. 794.

(h) *Wilkes v. Steward*, Coop. 6.

personal security, they may not lend to one of themselves, for the settlor must be taken to rely upon the united vigilance of *all* the trustees with respect to the solvency of the *borrower* (i).

And where the trustees of a sum of money for A. for life, remainder to her children, were authorised by the settlement to lend the trust fund upon real or *personal security* as should be thought good and sufficient, and the trustees lent it to a person in trade whom A. had married, and the money was lost, they were made responsible for the amount. Sir William Grant said, "The authority did not extend to an *accommodation*: it was evident the trustees had, upon the marriage, been induced to *accommodate* the husband with the sum, which they had no power to do (k)." But where the trustees were empowered to lend money to the husband on his personal security, to be used by him in business, and the trustees advanced 600*l.* to the husband, and he became insolvent, and the trustees received a dividend of 70*l.*, and they afterwards lent this sum to the husband on his recommencing business upon the security of his bond, and the money was lost, Sir L. Shadwell held that the trustees were not to be punished for the discretion they had exercised, for it did not follow, that, if a person once became insolvent, he was never again to be trusted (l).

Upon a marriage the wife's portion was settled upon the intended husband and wife for their respective lives, remainder to the issue, and a power was given to the trustees to "call in and lay out the money at greater interest

(i) — v. *Walker*, 5 Russ. 33.

7; and see *Stickney v. Sewell*, 1 M. & C. 14.

(l) *Burt v. Ingram*, 15 July, 1835. V. C. MS.

(k) *Langston v. Ollivant*, Coop.

if they could." The trustees sold out stock to the amount of 400*l.*, and laid it out in the purchase of an annuity for one life, and had the life insured. Lord Manners said the purchase of the annuity was not a proper disposition of a trust-fund settled as this was (*m*).

If trustees be authorised to invest in stock or real security, and they lend on personal security, and the money is lost, they shall be answerable, not for the amount of the stock which might have been purchased, but for the principal money lost. If real security had been taken, the principal only would have been forthcoming to the trust, and the want of real security is all that is imputable to the trustees (*n*).

A trustee may not invest the trust-fund in the stock of any private company, as South Sea Stock, Bank Stock, &c., for the capital depends upon the management of the governors and directors, and is subject to losses. The South Sea Company, for instance, might trade away their whole capital, provided they kept within the terms of their charter (*o*). "Bank stock," said Lord Eldon, "is as safe, I trust and believe, as any government security; but it is not government security, and therefore this

(*m*) *Fitzgerald v. Pringle*, 2 Moll. 534.

(*n*) *Marsh v. Hunter*, 6 Mad. 295.

(*o*) *Trafford v. Boehm*, 3 Atk. 440, see 444; *Mills v. Mills*, stated *infra*, p. 313; *Adie v. Fenniliteau*, cited *Hancom v. Allen*, 2 Dick. 499, note. The reporter speaks in the last case of South Sea *Annuities*; but no doubt the investment had been made in South Sea

Stock. In *Trafford v. Boehm* the investment had been in South Sea *Stock*, but the reporter cites the case by a similar mistake as one of investment in South Sea *Annuities*. For the difference between the two, see *Trafford v. Boehm*, 3 Atk. 444. *Adie v. Fenniliteau*, or more correctly, *Feuilletteau*, has been examined in the Registrar's Book, but the point does not appear.

Court does not lay out or leave property in Bank stock ; and what this Court will decree it expects from trustees and executors (*p*)."

With respect to investments upon mortgage, Lord Harcourt said, " The case of an executor's laying out money without the indemnity of a decree, if it were on a *real security* and one that there was no ground at the time to suspect, had not been settled ; but it was his opinion the executor, under such circumstances, was not liable to account for the loss (*q*)". And Lord Hardwicke (*r*), and Lord Alvanley (*s*), appear likewise to have held that a trustee or executor would be justified in laying out the trust-fund upon well secured *real estates*. But at the present day, when there is such a facility of investing upon government security through the medium of the public funds, a trustee or executor could scarcely be advised to make an investment upon mortgage where no authority was expressly given him. The practice of the Court, which ought to regulate the conduct of trustees, is now clearly established. Upon application to Lord Thurlow to have part of a lunatic's estate invested upon landed security, his Lordship said, " Though he felt perfectly convinced by what was stated to him that the security was unexceptionable, yet he would not permit such a precedent to be made. In latter times the Court had considered it as improper to invest any part of the lunatic's estate upon *private* security (*t*). " And Sir John Leach refused a similar appli-

- (*p*) *Howe v. Earl of Dartmouth*, 1 Dick. 126.
 7 Ves. 150. (*s*) *Pocock v. Reddington*, 5
 (*q*) *Brown v. Litton*, 1 P. W. Ves. 800.
 141. (*t*) *Ex parte Cathorpe*, 1 Cox,
 (*r*) *Knight v. Earl of Plymouth*, 182; *Ex parte Ellice*, Jac. 234.

cation with reference to the money of infants, at the same time expressing his surprise that any precedent could have been produced to the contrary (*u*).

Trustees may, as they generally are, be *expressly* empowered to invest on real security; but even then they must be careful not to advance more than two-thirds of the real value of the estate, if it be *freehold land* (*x*); or if the property consist of *houses*, or be otherwise of a fluctuating or deteriorating character, they would not be justified in advancing so much (*y*). They are also precluded from lending on mortgage to one of themselves (*z*).

Where trustees are expressly authorised to lend on real securities in England, Wales, or Great Britain, they are now empowered by Act of Parliament to lend on real securities in Ireland (*a*). But the 2nd section enacts that all loans in which any *minor, unborn child, or person of unsound mind* is interested, shall be made by the direction of the Court of Chancery or Exchequer, such direction to be obtained *in any cause* upon petition in a summary way. And the 4th section provides, that every such loan shall be made with the consent of the person or persons, if any, whose consent may be required as to the investment of such money upon real securities in England, Wales, or Great Britain, such consent to be testified in the manner required by the trust. And by the 5th section it is declared, that the provisions of the act shall not

(*u*) *Norbury v. Norbury*, 4 C. 8.
 Mad. 191; and see *Widdowson v. Duck*, 2 Mer. 494; *Ex parte Johnson*, 1 Moll. 128; *Ex parte Ridgeway*, 1 Hog. 309.
 (*y*) *S. C.*
 (*z*) *S. C.*; and see ——— v. *Walker*, 5 Russ. 7.
 (*a*) 4 & 5 Gul. 4, c. 29.
 (*z*) *Stickney v. Sewell*, 1 M. &

apply to any case in which the trust contains an express restriction *against* investment on securities in Ireland.

In the absence, then, of any express power, the only unobjectionable investment is in one of the *Government or Bank Annuities*; for here, as the directors have nothing to do with the principal, but merely superintend the payment of the dividends and interest till such time as the government may pay off the capital, it is not in their power, by mismanagement or speculation, to hazard the property of the shareholder (*b*). And of the Government or Bank Annuities, the one which the Court has thought proper to adopt is the Three per cent. Consolidated Bank Annuities, the fund, from its low rate of interest, the least likely to be determined by redemption (*c*). Let a trustee who has money in hand which he ought to render productive invest it on this security, at the same time executing a declaration of trust, that in the event of his bankruptcy or insolvency the fund may be identified, and he has done his duty, and will not be answerable for any subsequent depreciation (*d*).

In the report of *Hancom v. Allen* (*e*) it is said, "the trust money had been laid out by the trustees in funds which sunk in their value, without any *mala fides*; but the same not being laid out in the fund in which the Court

(*b*) *Trafford v. Boehm*, 3 Atk. 444, *per* Lord Hardwicke.

(*c*) See *Howe v. Earl of Dartmouth*, 7 Ves. 151.

(*d*) *Bird v. Lockey*, 2 Vern. 744, 4th point; *Ex parte Champion*, cited *Franklin v. Frith*, 3 B. C. C. 434; *Powell v. Evans*,

5 Ves. 841, and *Howe v. Earl of Dartmouth*, 7 Ves. 150; *Knight v. Earl of Plymouth*, 1 Dick. 126, *per* Lord Hardwicke; *Peat v. Crane*, cited *Hancom v. Allen*, 2 Dick 499, note; *Holland v. Hughes*, 16 Ves. 114, *per* Sir W. Grant.

(*e*) 2 Dick. 498.

directs trust money to be laid out, the trustees were ordered to account for the principal and pay it into the Bank, and then that it should be laid out in Bank Three per cent. Annuities." It might be inferred from this statement, that, if a trustee invest in any other government security than the Three per cent. Consols, the Court would hold him accountable for any loss by a fall of the stock ; but such a doctrine would be extremely severe against trustees, and the case as extracted from the Registrar's book is no authority for such a proposition. Thomas Phillips, a trustee of 1,500*l.*, instead of investing the money in a purchase of land or some sufficient security as required by the trust, advanced it to his brother, John Phillips, a banker, without taking any other precaution than accepting a simple acknowledgment of the receipt. John Phillips continued to pay interest upon the money for some time, but eventually became insolvent, and the fund was lost. The Court was compelled under these circumstances to call upon the trustee to make good the amount.

Where *successive estates* are limited, the scale should of course be held evenly as between all parties, and the tenant for life should not be allowed, by an investment on a security less safe or less permanent than the usual one, and therefore yielding to the present holder an increased rate of interest, to advance himself at the expense of the remainder-man. Upon this principle, if a testator's estate consist of Bank Stock, Long Annuities, or other fund either not a government security or not of the most permanent character, the Court, as soon as its observation is attracted to the circumstance, invariably directs a conversion of such estate into Three per cent. Bank

Annuities (*f*). Even Four per cent. and Five per cent. Bank Annuities, as more liable to the chance of redemption, are ordered to be similarly converted (*g*). It follows that trustees, who must be guided by the conduct of the Court, are bound, where successive interests are limited, to invest in the Three per cent. Bank Annuities, and in that fund exclusively.

Where a tenant for life has been wrongly in possession of the dividends of a stock which ought to have been converted, he will be accountable to the remainderman for the surplus of his receipts beyond the income he would have received had the fund been properly invested (*h*). Should the tenant for life be insolvent, the executors of the testator would probably be decreed to make compensation to the suffering party; but Lord Eldon said, he would

(*f*) *Howe v. Earl of Dartmouth*, 7 Ves 137; and the cases cited *Ib.* John Morris devised and bequeathed all his freeholds, leaseholds, and all his ready money, stocks in the public funds, goods, chattels, and effects, and all other his real and personal estate, to three trustees, their heirs, executors, and administrators, upon trust to pay the rents, issues, and profits of the freeholds and leaseholds, and the dividends, interest, and income of his money in the funds and other his said personal estate, unto Eliza for life, with remainders over. The testator died possessed of certain leaseholds and of shares in Bank stock. The income of the leaseholds and the Bank stock was for some time paid to the tenant for life.

A bill was afterwards filed by those entitled in remainder, and the Vice-Chancellor held, that there was no intention to devise any part specifically; that the Bank stock must be sold, not on the general ground only, but also because it depended on the wording of the orders of the directors to whom the bonuses should go; that so much as the tenant for life had received beyond what she was entitled to, must be refunded. *Mills v. Mills*, July 22nd, 1835. MS.

(*g*) *Howe v. Earl of Dartmouth*, 7 Ves. 151, *per* Lord Eldon; *Powell v. Cleaver*, and other cases, cited *Id.* 142.

(*h*) *Howe v. Earl of Dartmouth*, 7 Ves. 137, see 150, 151; *Mills v. Mills*, *supra*.

not state what the Court would do in such a case, for it depended on many circumstances (i). But in the subsequent case of *Dimes v. Scott* (k), where the executors were *expressly directed* to convert the testator's personal estate into money, and invest the proceeds in government or real securities in trust for A. for life, remainder to B., and the executors for eleven years permitted A. to receive 10 per cent. interest upon an Indian loan, it was held they were chargeable with the difference between the 10 per cent. interest they had wrongfully paid, and the interest that would have resulted from a conversion into Three per cent. Consols at the expiration of one year from the testator's decease.

If any stock, other than Three per cent. Consols, be *specifically* devised to A. for life, remainder to B., in that case the Court has no power to direct a conversion into Three per cent. Consols; and a power of varying the securities expressly given to the executors will make no difference in this respect, for the testator is held to have given them the authority, not with the intention of varying the relative rights of the legatees, but merely with the view of adding security to the property (l).

A testator gave the residuary estate to executors upon trust to pay the annual produce to A. for life in equal portions at *Lady-day* and *Michaelmas-day*, and after his decease in trust for other purposes. A motion was made that the executors might invest a sum in their hands in the Three per cent. Bank Annuities, but it was objected that the dividends of this stock were payable in January and

(i) See *Howe v. Earl of Dartmouth*, 7 Ves. 150; *Holland v. Hughes*, 16 Ves. 114.

(k) 4 Russ. 195.

(l) *Lord v. Godfrey*, 4 Mad. 455.

July, whereas, if the money were laid out in the Three per cent. Reduced Annuities, the dividends would be payable at the time directed by the testator; and Sir John Leach made the order accordingly (*m*).

A *mortgage* may produce a higher rate of interest than an investment in the Three per cent. Consols; but in this case the advantage does not arise from the inferior nature of the security as in the instance of Bank Stock, nor from any perishable or redeemable quality as in the instance of the Long Annuities or the Four per Cents.; the Court, therefore, will not permit the mortgage to be called in without a previous inquiry by the Master whether it will be for the benefit of all the parties interested (*n*).

And where a testator dies in India, and neither the fund nor the parties entitled to it are under the jurisdiction of the Court of Chancery, it is not the duty of the executor to transmit the assets to England to be invested in the Three per cent. Consols, but he may invest the property in the securities of the East India Company, and the tenant for life will be entitled to the dividends or interest, though to the amount of 10 or 12 per cent. If the parties return to England, and so come under the jurisdiction of the Court, the fund may then be brought over at the instance of the remainderman, and the tenant for life must submit to the consequential reduction of his income(*o*).

If trustees or executors be directed by the will to convert the testator's property and invest it in government or real securities, they will be answerable for the

(*m*) *Caldecott v. Caldecott*, 4 *mouth*, 7 Ves. 150.
Mad. 189. (*o*) *Holland v. Hughes*, 16 Ves.
(*n*) See *Howe v. Earl of Dart-* 111; *S. C.* 3 Mer. 685.

amount of stock which might have been purchased at the period the conversion should have been made (*p*).

If the trust-fund be standing out on a proper security, and the trustee call it in for no purpose connected with the trust, and therefore in dereliction of his duty, he will be compellable, at the option of the *cestuis que trust*, either to replace the specific stock, or to account for the proceeds of the sale (*q*) with interest at 5 per cent. (*r*). But in a case where the trustee did not seek to make any thing himself, but was honourably unfortunate in yielding to the importunity of one of the *cestuis que trust*, it was held by Sir A. Hart, that, although the trustee was bound to replace the specific stock, the *cestuis que trust* should not have the option of taking the proceeds with interest (*s*). If the trustee become bankrupt, the *cestuis que trust* may at their option prove for the proceeds with interest, or for the price of the specific stock at the date of the commission (*t*).

We may conclude this section with the general remark, that trustees would not be justified in making any investment that would subject the trust-money to the power or control of any *one* of the trustees singly; they could not, for instance, lay out the fund upon India bills, (supposing such a security were warranted by the settlement,) if made payable, not to all the trustees

(*p*) *Hockley v. Banstock*, 1 Russ. 141; *Dimes v. Scott*, 4 Russ. 195.

(*q*) *Bostock v. Blakeney*, 2 B. C. C. 653; *Ex parte Shakeshaft*, 3 B. C. C. 197; *O'Brien v. O'Brien*, 1 Moll. 533, *per* Sir A. Hart; *Raphael v. Boehm*, 11 Ves. 108, *per* Lord Eldon.

(*r*) *Crackelt v. Bethune*, 1 J. & W. 586; *Mosley v. Ward*, 11 Ves. 581; *Pocock v. Reddington*, 5 Ves. 794; *Piety v. Stace*, 4 Ves. 620.

(*s*) *O'Brien v. O'Brien*, 1 Moll. 533.

(*t*) *Ex parte Shakeshaft*, 3 B. C. C. 197.

in their joint capacity, but to one of the trustees individually (*u*).

IV. Of the due application of the trust-fund to the purposes of the trust.

1. It is incumbent upon the trustee to ascertain, before he parts with the possession of the property, who are the parties legally entitled to it. If through any misapprehension on the part of the trustee the trust-money find its way into a channel not authorized by the terms of the trust, he will be held personally responsible for the misapplication to the parties who can establish a better claim. "I have no doubt," said Lord Redesdale upon one occasion, "the executors *meant* to act fairly and honestly, but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts he has done. If under the best advice he could procure he acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer (*x*)."

This must be considered as the *general* rule; but under *particular* circumstances the Court may hold an executor justified by having acted upon the advice of counsel. Thus, a testator had executed a promissory note in Switzerland for 600*l.*, but by a counter-note executed shortly after it was declared that 400*l.* only was due upon valuable consideration. A Swiss Court, upon proceedings taken there, had awarded the payment of the whole 600*l.* The executor in England, though by our

(*u*) *Walker v. Symonds*, 3 Sw. 1, see 66; and see *Salway v. Salway*, 2 R. & M. 218.

(*x*) *Doyle v. Blake*, 2 Sch. & Lef. 243.

law under the circumstances of the case but 400*l.* was demandable, had discharged the whole amount. Lord Alvanley said, "I very much wish, upon the rules of the Court, I could hold the executor fully justified; but when I consider his neglect in making this payment of his own conjecture and to the wrong of the *cestuis que trust*, I must hold that the Master was right in charging him. He certainly acted with a good intention, and imagined himself justified; but he thought fit to depend upon that which a prudent executor would not have relied on—this strange transaction in Switzerland. *If he had taken advice, and been advised by any gentleman of the law in this country that he was bound to make this payment, I would not have held him liable, for I will not permit a testator to lay a trap for his executor, by doing a foolish act which may mislead him (y).*"

Where there exists any reasonable doubt as to the relative rights of the parties interested, the trustee may always protect himself by submitting the question to the judgment of the Court, and of course he will be allowed the costs and expenses incurred in making the application (z).

Where A., possessed of 1,000*l.* Million Bank Stock, employed B., a broker, to receive the dividends for her, and B. forged a letter of attorney authorizing him to sell the stock, and a sale was effected accordingly, it was decreed by Lord Northington, that the company was bound to make good the loss; for "A trustee," he said, "whether a private person or body corporate, must see to

(y) *Ves v. Emery*, 5 Ves. 141. 583; *Curteis v. Candler*, 6 Mad.

(z) See *infra*; and see *Talbot* 123; *Knights v. Martin*, 1 R. & M. v. *Earl of Radnor*, 3 M. & K. 70; *S. C.* Taml. 237. 252; *Goodson v. Ellison*, 3 Russ.

the reality of the authority empowering them to dispose of the trust-money; and if the transfer be made without the authority of the owner, the act is a nullity, and in consideration of law and equity the rights remain as before (*a*)."

If the trustee, by mistake, make an overpayment to the *cestui que trust*, he may reimburse himself by deducting the amount from the next payment that accrues due (*b*).

2. It has already been observed, that a trust, being a matter of personal confidence, cannot be delegated (*c*). It follows, that if a trustee confide the application of the trust-fund to the care of his attorney (*d*), co-trustee, or co-executor (*e*), and, *a fortiori*, if to a stranger (*f*), he will be personally responsible for any loss that may result.

The case of *Balchen v. Scott* (*g*) is no exception to this rule. An executor had received a bill of exchange by the post from a debtor to the estate, and transmitted it to his co-executor. It was held, that by this proceeding the executor had not acted in the trust (*h*), and therefore was no more answerable for the application of the money by the co-executor, than any stranger would have been under similar circumstances.

(*a*) *Ashby v. Blackwell*, 2 Ed. 299. *Spurling*, 1 R. & M. 66, per Sir J. Leach; *Kilbee v. Sneyd*, 2 Moll.

(*b*) *Livesey v. Livesey*, 3 Russ. 287. 200, 212, per Sir A. Hart; *Lane v. Wroth*, and *Stanley v. Darington*, cited in *Anonymous case*, Mos.

(*c*) See *supra*, Ch. 15.

(*d*) *Chambers v. Minchin*, 7 Ves. 196, per Lord Eldon. 36; *Marriott v. Kinnersley*, Taml. 470.

(*e*) *Langford v. Gascoyne*, 11 Ves. 333; *Harrison v. Graham*, 3 Hill's MSS. 239, cited 1 P. W. 241, note (*g*), 6th ed.; *Davis v.* (*f*) See *Kilbee v. Sneyd*, 2 Moll. 199.

(*g*) 2 Ves. jun. 678.

(*h*) See *supra*, Ch. 12.

In *Churchill v. Hobson* (i) an executor had paid 500*l.* into the hands of his co-executor, who misapplied it, and it was ruled by the Court he was not bound to make it good; but the decision is universally considered as having turned upon the circumstance that the co-executor was a *banker*, and had been trusted by the testator in his lifetime, besides being made his executor at his death (k). Lord Harcourt, in his judgment, observed, "The co-executor having been the cashier with whom the testator in his lifetime chose to intrust his money, the executor ought not to suffer for having trusted him whom the testator himself in his life trusted."

A testator recommended his executors to employ A. (who had been in the employment of the testator himself,) as their clerk or agent, which they did, and A. misapplied part of the assets. The *cestuis que trust* contended that executors were answerable for the default of their servant. Sir A. Hart said, "That is the rule. It is hard occasionally, where the executor has acted with good faith; but it is established, and it is beneficial in general. The rule, however, is governed by circumstances; and if a testator points out an agent to be employed by the executor, I think if such employee received a sum of money, and immediately made default, the executor would clear himself by shewing that the testator designated the person, and that he could not by the exercise of reasonable diligence recover the money. But the excuse of reasonable diligence is still required. The effect of a recommendation is to discharge executors

(i) 1 P. W. 241.

note (y), 6th ed.; *Chambers v.*

(k) See *Harrison v. Graham*, 3 *Minchin*, 7 Ves. 198.
Hill's MSS., cited 1 P. W. 241,

to the extent of selecting, but still the person recommended is the agent of the executors, and they are bound to use diligence in looking after him: the question then becomes one of wilful default, not concluding the executor by the mere fact of loss arising from such employee: nor does the diligence which is required demand that he should institute a suit against the agent; but only that he should have been vigilant, and have called upon him to account: he may be able to shew some discreet and reasonable ground for not having sued him (*l*)."

An executor cannot be answerable for having handed over money which he had no legal right to retain. Thus, a testator appointed A., B., and C. his executors, and empowered A. to sell certain freehold premises, and directed the proceeds of the sale to be applied and disposed of in the same manner as his personal estate. A. employed B. to make the sale, who, having disposed of the property, paid the proceeds to A., by whom the money was misapplied. It was held that B. was not answerable for this, the money having come to his hands, not in the character of executor, but of agent (*m*).

But trustees and executors may justify their administration of the trust fund by the instrumentality of others, where there exists a moral necessity for it according to the common usage of mankind (*n*). "For example," said Lord Redesdale, "an executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay those debts: he is considered to do this of necessity: he could not transact business without trusting

(*l*) *Kilbee v. Sneyd*, 2 Moll. M. 64; S. C. Taml. 199; and see 199, 200. *Crisp v. Spranger*, Nels. 109.

(*m*) *Davis v. Spurling*, 1 R. & (n) *Ex parte Belchier*, Amb. 218.

some person, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted money to a person to whom he would himself have given credit, and would in his own business have remitted money in the same way. It would be the same were one executor in India and another in England, the assets being in India but to be applied in England: there, the co-executor is appointed for the purpose of carrying on such transaction, and the executor is not responsible; for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence (o)."

And in such cases the executor or trustee is not called upon to take any security from the agent, for to do that upon every occasion would tend greatly to the hindrance of business (p).

Where trust-money is to be transmitted to a distance, the trustee may do it most conveniently and securely through the medium of a responsible bank, or he may take bills drawn by a person of undoubted credit, and payable at the place whither the money is to be sent. Thus in *Knight v. The Earl of Plymouth* (q) a receiver, in order to bring money to London, took bills which at the time they were obtained there was no ground to suspect, but which, as it afterwards happened, were protested in London, and the money lost. Lord Hardwicke

(o) *Joy v. Campbell*, 1 Sch. & Lef. 341; and see *Bacon v. Bacon*, 5 Ves. 331, and compare *Chambers v. Minchin*, 7 Ves. 193, and *Langford v. Gascoyne*, 11 Ves. 335; and see *Davis v. Spurling*, 1 R. & M. 66.

(p) *Ex parte Belchier*, Amb. 220, per Lord Hardwicke.

(q) 1 Dick. 120; *S. C.*, 3 Atk. 480; recognised *ex parte Belchier*, Amb. 219, and *Rowth v. Howell*, 3 Ves. 566; and see *Wren v. Kirton*, 11 Ves. 380, 381.

said, "The method the receiver took was highly prudent; it was well intended, and the only way he could take, unless he had himself carried the money in *specie*, the hazard of which would have been great, and if a loss had then incurred, in my opinion he would have been, if not answerable, highly blameable."

But the money must be paid in to the account of the *trust estate*, and the bill must be taken in favour of the trustee *in that character*, by which precaution, should the trustee become bankrupt or insolvent, the money so earmarked would be specific assets to the credit of the trust. If the trustee so manage the transaction, that, in case of his own failure, the general creditors and not the trust estate would have the benefit, then, if the bank break, or the bills be dishonoured, the trustee will be held responsible for the loss to the *cestuis que trust* (r).

The rule applied to executors in a Court of Law is somewhat different from that established in Courts of Equity. An executor once become responsible by actual receipt of any part of the assets cannot at law found his discharge in respect thereof as against a creditor, either by a plea of reasonable confidence disappointed, or a loss not occasioned by any negligence or default; as, if an executor transmit a sum to his co-executor under circumstances that in equity would justify the confidence, a Court of Law would still hold him responsible for any misapplication by the co-executor, and could not allow him to plead *plene administravit* (s).

3. If the trustee be guilty of any inexcusable delay in

(r) See *Wren v. Kirton*, 11 Ves. 380, 381; *Masséy v. Banner*, 1 J. & W. 247. (s) *Crosse v. Smith*, 7 East 246; and see *Jones v. Lewis*, 2 Ves. 241.

the administration of the trust fund, it must be at his own peril.

A testator gave a legacy of 1,200*l.*, and directed the executor to invest it in the funds: the estate was wound up, but the executor neglected to invest, and the price of stock rose. It was held, that retainer by the executor after accounting for the residuary estate was equivalent to payment to a trustee: that, if the *cestui que trust* sustained a loss by the trustee's neglecting his duty, the *cestui que trust* had a right to charge the trustee with the amount of the loss: that the executor was therefore bound to purchase as much stock as the legacy would have produced had it been invested at the proper period (*z*). So, if a trustee suffer a policy to become forfeited through neglect to pay the premiums, he is bound to make compensation to the *cestui que trust* for the consequential damage to the estate (*u*). An executor should discharge the testator's liabilities as soon as he has collected assets sufficient for the purpose, and therefore if he keep money in his hands idle, when there is an outstanding debt upon which interest is running, he will himself be charged with interest on a sum equal in amount to the debt, and, if the outstanding debt carry interest at 5 per cent., the executor will be charged with interest at the same rate (*x*).

After payment of debts and legacies, if the executor or administrator be guilty of *laches* in accounting for the surplus estate to the residuary legatee (*y*), or next of

(*z*) *Byrchall v. Bradford*, 6 Mad. 13; *S. C.* id. 235. cited in *Tebbs v. Carpenter*, 1 Mad. 301; *Hall v. Hallet*, 1 Cox, 134.

(*u*) *Marriott v. Kinnersley*, Tambl. 470. (*y*) *Forbes v. Ross*, 2 Cox, 113; *Seers v. Hind*, 1 Ves. jun., 294;

(*x*) *Dornford v. Dornford*, as *Younge v. Combe*. 4 Ves. 101;

kin (*z*), he will be charged by the Court with interest for the balance improperly retained in his hands.

And, on the same principle, if the assignees of a bankrupt neglect to pay a dividend to the creditors (*a*), or the receiver of an estate do not move the Court in proper time to have the rents invested (*b*), they will be ordered to account for the money with interest from the time the breach of duty commenced.

And an executor or other person cannot excuse himself by saying that he made no actual use of the money, but lodged it at his banker's (*c*), and to a separate account (*d*), for it was a breach of trust to *retain* the money: he was bound to make it *productive* to the *cestui que trust*.

But, where an executor conceived he was himself entitled to the residue, and the Court considered his claim to be just in itself, but was obliged from a particular cir-

- Longmore v. Broom*, 7 Ves. 124; *Hulme*, 1 J. & W. 122.
Rocke v. Hart, 11 Ves. 58; *Piety v. Stace*, 4 Ves. 620; *Ashburnham v. Thompson*, 13 Ves. 402; *Raphael v. Boehm*, 11 Ves. 92; *S. C.* reheard, 13 Ves. 407; *S. C.* spoken to, 13 Ves. 590; *Dornford v. Dornford*, 12 Ves. 127; *Franklin v. Frith*, 3 B. C. C. 433; *Littlehales v. Gascoyne*, 3 B. C. C. 73; *Newton v. Bennet*, 1 B. C. C. 359; *Lincoln v. Allen*, 4 B. P. C. 553; *Crackelt v. Bethune*, 1 J. & W. 586; *Tebbs v. Carpenter*, 1 Mad. 290.
 (z) *Hall v. Hallet*, 1 Cox, 134; *Perkins v. Baynton*, 1 B. C. C. 375; *Stackpoole v. Stackpoole*, 4 Dow, 209, see 224; *Heathcote v.*
Treves v. Townshend, 1 B. C. C. 384; *in re Hilliard*, 1 Ves. jun. 89.
 (b) *Foster v. Foster*, 2 B. C. C. 616; *Hicks v. Hicks*, 3 Atk. 274; *Hankey v. Garret*, 1 Ves. jun. 236.
 (c) *Younge v. Combe*, 4 Ves. 101; *Franklin v. Frith*, 3 B. C. C. 433; *Treves v. Townshend*, 1 B. C. C. 384; *in re Hilliard*, 1 Ves. jun. 89; *Dawson v. Massey*, 1 B. & B. 230; *Browne v. Southouse*, 3 B. C. C. 107; and see *Rocke v. Hart*, 11 Ves. 60.
 (d) *Ashburnham v. Thompson*, 13 Ves. 402.

cumstance in the case to give judgment against him, it was thought too severe to put him in the situation of one who had neglected his duty, and the demand against him for interest was consequently disallowed (*e*).

The rate of interest with which an executor is usually charged in these cases is 4 per cent (*f*); but the rule holds only where it does not appear that the executor has made greater interest, for the Court invariably compels the executor to account for every farthing he has actually received (*g*).

It was formerly held by the Court, that an executor might employ the assets in his trade, or lend them upon security, and he should not be called upon to account for the profits or interest (*h*). And such was the case even where money which had been lent by the testator on good security was called in by the executor for the express purpose of being relent by himself. The executor, it was argued, was not bound to lend the assets, and if he did so, it was at his peril, and he was answerable for losses, and, if accountable for any loss, he was surely entitled to

(*e*) *Bruere v. Pemberton*, 12 Ves. 386. jun. 236; but see *Bird v. Lockett*, 2 Vern. 744, 4th point.

(*f*) See *Forbes v. Ross*, 2 Cox, 116; *Hall v. Hallet*, 1 Cox, 138; *Tebbs v. Carpenter*, 1 Mad. 306; in *re Hilliard*, 1 Ves. jun. 90; *Browne v. Southouse*, 3 B. C. C. 107; *Mosley v. Ward*, 11 Ves. 582; *Perkins v. Baynton*, 1 B. C. C. 375; *Treves v. Townshend*, 1 B. C. C. 386; *Hicks v. Hicks*, 3 Atk. 274; *Younge v. Combe*, 4 Ves. 101; *Rocke v. Hart*, 11 Ves. 58; *Hankey v. Garret*, 1 Ves. jun. 236; but see *Bird v. Lockett*, 2 Vern. 744, 4th point.

(*g*) *Forbes v. Ross*, 2 Cox, 116, per Lord Thurlow; in *re Hilliard*, 1 Ves. jun. 90, per eundem; *Hankey v. Garret*, 1 Ves. jun. 239, per eundem; *Brown v. Litton*, 10 Mod. 21, per Lord Harcourt; *Hall v. Hallet*, 1 Cox, 138, per Lord Thurlow.

(*h*) *Grosvenor v. Cartwright*, 2 Ch. Ca. 21; *Linch v. Cappy*, 2 Ch. Ca. 35; and see *Brown v. Litton*, 1 P. W. 140.

any gains (i). But Lord North overruled the doctrine in spite of the alleged practice of the Court for the last twenty years, and the authority of above forty precedents. As to the argument, that, if the money should be lost, the executor would be personally responsible, his Lordship said, it was very well known that a man might insure his money at the rate of 1 per cent (k).

A distinction was afterwards taken between a solvent and an insolvent executor; that the former, as he might suffer a loss, should take the gain, but, as an executor who was insolvent at the time of the loan could incur no risk of a loss personally, he should not be allowed to take to himself any benefit (l).

And Lord Hardwicke drew another distinction; that, if an executor had *placed out* assets that were *specifically bequeathed*, he should be made to account for the interest, but the master was never directed to charge interest upon an executor who made use of *general* assets come to his hands *in the way of his trade* (m).

But all these refinements have long since been swept away (n), and the rule is now *universal*, that, whether the executor was solvent or insolvent, whether the money was part of the general assets or specifically bequeathed, whether lent upon security or employed in the way of trade, the executor shall account for the utmost actual profits to the testator's estate (o).

(i) See *Ratcliff v. Graves*, 2 Ch. 603.

Ca. 152.

(k) *Ratcliff v. Graves*, 1 Vern. 196; *S. C.* 2 Ch. Ca. 152.

(l) *Bromfielf v. Wytherley*, Pr. Ch. 505; *Adams v. Gale*, 2 Atk. 106.

(m) *Child v. Gibson*, 2 Atk.

(n) As to the former distinction, see *Newton v. Bennet*, 1 B. C. C. 361, *Adye v. Feuilliteau*, 1 Cox, 25; and as to the latter see *Newton v. Bennet*, 1 B. C. C. 361.

(o) *Tebbs v. Carpenter*, 1 Mad. 304, *per* Sir T. Plumer; *Lee v. Lee*,

And where the money has been employed in trade, the *cestui que trust* has the option of taking the actual profits or of charging the executor with interest (*p*) at the rate of 5 per cent (*q*), the court presuming every business to yield a profit to that amount; but Lord Thurlow once offered an inquiry whether under the circumstances of the case such a rate of interest might not be too high (*r*). Lord Gifford, where the trustee acknowledged he had made great profits, though he could not furnish the particulars, and the *cestui que trust* waived the investigation of the actual gains, directed 5 per cent. interest to be charged *with annual rests* (*s*).

An executor is considered to employ the money in trade, if he lodge it at his banker's, and place it in his own name, and is therefore called upon to pay interest at 5 per cent: a merchant must generally keep a balance at his banker's, and this answers the purpose of his credit as much as if the money were his own (*t*).

An executor may also be chargeable with interest at 5 per cent. where he is guilty, not merely of negligence, but of actual corruption or misfeasance (*u*).

2 Vern. 548; *Adye v. Feuilletau*, 518.

1 Cox, 24; *Piety v. Stace*, 4 Ves. 622, *per* Lord Alvanley.

(*p*) *Heathcote v. Hulme*, 1 J. & W. 122; *Anon. case*, 2 Ves. 630, *per* Sir T. Clarke; *Docker v. Somes*, 2 M. & K. 655; *Palmer v. Mitchell*, cited *ib.* 672; *ex parte Watson*, 2 V. & B. 414.

(*q*) *Treves v. Townshend*, 1 B. C. C. 384; *Rocke v. Hart*, 11 Ves. 61, *per* Sir W. Grant; *Heathcote v. Hulme*, 1 J. & W. 122, see 134; *Attorney-General v. Solly*, 2 Sim.

(*r*) *Treves v. Townshend*, 1 B. C. C. 384.

(*s*) *Walker v. Woodward*, 1 Russ. 107.

(*t*) *Treves v. Townshend*, *ubi supra*; *Moons v. De Bernales*, 1 Russ. 301; *in re Hilliard*, 1 Ves. jun. 90; *Sutton v. Sharp*, 1 Russ. 146; *Rocke v. Hart*, 11 Ves. 61; but see *Browne v. Southouse*, 3 B. C. C. 107.

(*u*) *Tebbs v. Carpenter*, 1 Mad. 306, *per* Sir T. Plumer; *Bick v.*

Simple interest only, whether at the rate of 4 or 5 per cent., is usually charged ; but, where a testator expressly directs an accumulation to be made, and the executor disregards the injunction, it seems *compound* interest will be decreed.

In the case of *Raphael v. Boehm* (x) a testator domiciled at Madras gave the residue of his estate upon certain trusts for his children, and “directed that the interest of the portions, or such part as his executors should deem sufficient, should be applied to the maintenance and education of each child respectively, and the surplus of such interest should be accumulated for the benefit of such child, and make part of his or her estate, and the testator gave his executors a legacy for their trouble, and declared they should not derive any advantage from keeping in their possession any sums of money without accounting for the legal interest thereof.” The testator died in 1791. In 1794 the children filed a bill against Boehm, the executor in England, for an account. In 1798 it was ordered by Lord Loughborough that the Master should compute interest after the rate of 5 per cent. per annum on all sums of money, part of the testator’s estate, received by or come to the hands of the defendant from the time he received the same respectively during the time the same continued in his hands, except the legacies to the executors, and what was expended for maintenance ; and that the Master should, in such computation, make *half-yearly rests*. In pursuance of this order the Master calculated interest on all sums received by the defendant from the time he received the same, and at the end of

Motly, 2 M. & K. 312; and see 670; but see *Meader v. M’Cready*,
Crackell v. Bethune, 1 J. & W. 1 Moll. 119.
588; *Docker v. Somes*, 2 M. & K. (x) 11 Ves. 92.

every half-year added the amount of interest to the principal, and then, taking the result as the principal for the next half-year, charged interest as before. To this report an exception was filed on the ground that the Master had misunderstood the order; that the meaning of the direction to make half-yearly rests was, that, as the fund in the hands of the executor was continually fluctuating, the Master was, at the end of each half-year, to take an account of the receipts and payments of the executor, and strike a balance, and charge simple interest on the result. When the question came before the court, Lord Eldon said, "Under a direction for accumulation, though the Court ought to act with great indulgence upon an inquiry whether the executor has, in a fair and *bonâ fide* management, made the most of the fund, and ought to be charged as having made interest of principal as soon as received, yet, taking no step for years, and keeping the whole in his hands, he acts against his duty. Upon the nature of his duty compound interest ought to be given, as much as upon contract or the usage of dealing. If, as in this case, the testator leaves 30,000*l.* to an infant of six months old, and, after maintenance and education, the executor is directed from time to time to convert the interest into principal, and, independent of that, there are other funds quite sufficient for maintenance, the dividends of the 30,000*l.* being paid into Court every half-year, the dividends would form additional principal: in the course of twenty years a great deal more than double the legacy. But, if the executor is at liberty to say he will keep it in his own hands during the whole minority, and, at the end of it, all the court can do is to order the account to be taken without annual rests, the consequence, take it at 5*l.* per cent., is, that the executor would, at the end of the

first year, have 31,500. If that sum of 1,500, the first year's interest, is to be carried into a separate column and not added to the principal and is not to carry interest, that sum, the first year's interest, would lie in the hands of the executor 20 years, yielding no fruit to the infant. The next year he will have 3000*l.* in his hands nineteen years without interest; and so on; and, if it is considered what the executor may make of the interest thus long in his hands as a dead capital, the provision for him is as much as that of the infant. Upon the justice of this case what ought to be the demand I have very frequently and anxiously thought, and, adverting to all the cases in which the Court has frequently considered it to be consistent with every view of moral justice that individuals in accountable situations should pay compound interest, though it has not been the habit of the court to give it, I have not the least difficulty in saying, that, if I had to make the decree upon this evidence, I should have charged the defendant with compound interest. He was made one of the executors with a legacy for his trouble: the will states in the most express manner, that the executors are to make no advantage whatsoever by keeping money in their hands, and farther imposing upon them the necessity of parting with the money in their hands or of paying 5*l.* per cent. As to the particular fund which is the subject of this suit, the testator expressly directs accumulation during the infancy of his children. This is not therefore a case of contract, in which you can reason upon it as impolitic to encourage usury. It is only that the testator places money in the hands of these persons, with an express prohibition to keep it in their own hands, and a direction expressly to place it out in some such way that they can accumulate interest. There-

fore by necessary consequence they keep it against the express direction of the will. If an executor, with an express trust to accumulate, comes with this sort of case, desiring the Court not to weigh it in golden scales, but to measure by his general conduct an honest endeavour to execute the trust, this Court would not deal out a hard measure to him ; but, take it as a legacy to an executor as trustee for an infant a week old, who says he has done nothing during the whole infancy, that he has kept the money without shewing an endeavour to lay it out or that he had not the means, must the Court hold that he is not to be charged in any degree, or take the strongest rule they can take ? If not the former, the rule must be the latter, for there is no other. Where there is an express trust to make improvement of the money, if he will not honestly endeavour to improve it, there is nothing wrong in considering him, as to the principal, to have lent the money to himself upon the same terms upon which he could have lent it to others, and as often as he ought to have lent it, if it be principal, and as often as he ought to have received it and lent it to others, if the demand be interest, and interest upon interest. If the demand goes farther than that, my opinion is that it is not a wrong principle to go as far, and that this is a species of case in which the Court would shamefully desert its duty to infants by adopting a rule that an executor might keep money in his hands without being answerable as if he had accumulated ; and, if the Court cannot find out from the actual circumstances proved that he has attempted accumulation, and, the charge falls more heavily upon him on that account, the fault is his own in not shewing what endeavours to improve it he had made. However, I doubt whether the Court ever directed interest upon

payments and receipts to be computed at the end of the *half-year*, and then interest to be made principal : I doubt whether that has been ever done in practice : I do not say that it ought not to be done in some cases, and perhaps there is not much ground to complain of it in this case." Thus Lord Eldon entirely approved of the direction to charge *compound* interest, though he doubted whether, as a general rule, the account should be taken with *half-yearly* rests.

The cause was afterwards reheard before Lord Erskine, when the original decree was confirmed (y). "I agree," said his Lordship, "that this account ought to be taken with rests. It is clear upon the report of this case, that Lord Eldon would have made the same decree, as to the rate of interest at 5 per cent., and with half-yearly rests, and upon this principle, in which I concur, that *a trustee directed to do an act from which the cestui que trust would derive a particular advantage, and not performing that trust, shall be charged precisely in the same manner as if he had performed it.*" And on the following day his Lordship added, "I have conversed with Lord Eldon, who says, if the cause had come originally before him, he should have found no difficulty in making the decree according to the substance and justice of the case, and upon this clear principle, in which I perfectly concur, that the duty of this executor does not depend upon the general rule as it relates generally to administration of assets, but upon the special rule prescribed by this particular will, by which accumulation is directed, the particular mode of accumulation is pointed out, and the executor is told by the will that he is to derive no

(y) 13 Ves. 407.

advantage from the trust." When the cause came on before Lord Eldon upon further directions (x), his Lordship declared himself to be still of the same mind. "The ground," he said, "upon which my judgment rests, is, that the rule imposed upon the executor the duty of accumulating the property. In the instance of an express trust to accumulate, the Court is required to see that the *cestuis que trust* are placed as near as possible in the same situation in which they would have been if the trust had been executed."

In *Dornford v. Dornford* (a) a testator directed that the money arising from the sale of his real and personal estate should be invested in the public funds in the joint names of his executors, in trust for his nephew, the interest arising therefrom to be allowed discretionarily by his executors as a provision to complete the education of his nephew until he attained the age of twenty-one, and the testator requested that the surplus interest, if any, should be invested in the public funds with the principal stock, in the joint names of his executors, as soon as the sum would purchase 50*l.*, and that, as soon as his nephew should attain the age of twenty-one, the principal sum and the accumulated interest should be invested in a purchase of land. One only of the executors acted, who converted a large sum to his own use, and became bankrupt. A claim was made by the *cestuis que trust* against the assignees for interest at the rate of 5*l.* per cent., with rests, upon the principle of *Raphael v. Boehm*. Sir W. Grant said, "The direction to accumulate is as imperative in this case as it was in *Raphael v. Boehm*, the tes-

(x) 13 Ves. 590.

of the testator, see *Tebbs v. Car-*

(a) 12 Ves. 127. For the will *penter*, 1 Mad. 301.

tator directing accumulation of the interest, and even when 50% should be collected. It struck me that the circumstance that this happens to be a question arising with the assignees after the bankruptcy of the executor makes no difference, for the question is, what is the obligation which this Court attaches upon the breach of such a duty, and that obligation is equivalent to the contract of the party: the Court says, if you neglect your duty and keep the money yourself, your obligation is to put the infant in the same situation as if you had not done so. The Court does not inquire into the particular benefit that has been made, but fastens upon the party an obligation to make good the situation of the *cestuique trust*. That is just the same thing as an engagement, and if the bankrupt had entered into an engagement, could there be a doubt that the mode in which the debt would have been calculated at the date of the bankruptcy would have been by ascertaining what would have been the amount of the debt supposing the direction had been complied with?" From these observations one would naturally conclude that interest with rests was directed, and to that effect is the marginal note of the case by the reporter, but the decree (for what reason does not appear,) was expressed in the following terms, that "the Master should compute interest on the balances which were from time to time in the hands of the bankrupt from the end of two months from the death of the testator to the time of the bankruptcy, such interest to be computed after the rate of 5 per cent. per annum on so much thereof as was equal to the bond debts reported due from the testator's estate, and after the rate of 4 per cent. per annum on the residue thereof (b)."

(b) See the decree correctly stated from R. L. in *Tebbs v. Carpenter*, 1 Mad. 302.

In the case of *Tebbs v. Carpenter* (c) a testator gave to his wife an annuity of 600*l.*, and directed, that, "after payment of his debts, funeral expenses, and his wife's annuity, the money arising from collecting his rents should be put out into the Four per Cent. Annuities until after his wife's death, and then such sum as might be found should be divided amongst certain persons in equal shares." The executors at the end of a year from the testator's death had in the hands of their agent by whom the rents were collected a considerable balance, which, as there were no pressing demands against them, they ought to have invested as directed by the will. This they had neglected to do, and the question then arose whether single or compound interest should be charged against them in respect of the balance. Sir T. Plumer, referring to *Raphael v. Boehm*, observed, "That decree was founded on very particular circumstances, for 30,000*l.* was given there *in solido* to be laid out, and there could not be a more manifest violation of the executor's duty: he did not lay out the money, but used it in his trade: it was a wilful violation of the will, which prohibited retainer and directed accumulation;" and then distinguished the case before him as one not of *misfeasance*, but simply of *negligence*. "Have these executors," he asked, "made any use of the money to their own profit or advantage? The employment of an agent who alone had possession of the balances, though not any ground of excuse, shews they did not in fact derive any benefit or profit to themselves, nor act with that view. I think therefore no more than the usual interest should be given. Considering that the trust was onerous, the property difficult to manage, and the agent employed was

(c) 1 Mad. 290.

the son-in-law of the testator, named by him as a trustee for another purpose in the will, and one of the *cestuis que trust* of the property, it would be pressing these executors beyond the precedents cited, if, besides the arrears of rents and the balances in their hands, they were to be charged either with 5 per cent. or compound interest."

Thus, Sir T. Plumer refused to apply the doctrine laid down in *Raphael v. Boehm* to a case, not of actual misfeasance, but merely of negligence; but it will be observed that Sir T. Plumer considered the question to be whether an executor should *in that character* be chargeable with compound interest, whereas the principle upon which *Raphael v. Boehm* was founded, and which applies to a case of negligence as well as misfeasance, was this, that an executor by retainer of the assets after payment of debts assumes the character of trustee, and if the will declare a trust of accumulation, and the trustee neglect his duty, the obligation is laid upon the trustee of compensating the *cestui que trust* for the loss. It is submitted that the doctrines laid down in *Raphael v. Boehm* have not been shaken.

If there be a mere direction to the executor to invest upon trust, but no injunction to accumulate the proceeds, the executor will be charged with simple interest only, and at 4 per cent. (d).

An executor will not in general be charged with interest but from the end of a year from the time of the testator's decease. "The question," said Lord Thurlow, "whether an executor shall be charged with interest on

(d) *Rocke v. Hart*, 11 Ves. 58; *v. Thompson*, 13 Ves. 402, see (see the will stated in *Tebbs v. Carpenter*, 1 Mad. 305.) *Ashburnham v. Bethune*, 1 J. & W. 586; *Tebbs v. Carpenter*, 303; *Crackell v. Bethune*, 1 J. & W. 586.

the assets retained in his hands, turns upon this, viz. whether the fund has been so kept for any other purpose than that of discharging the growing claims upon it. It frequently may be necessary for an executor to keep large sums in his hands, especially in the course of the first year after the decease of the testator, in which case such necessity is so fully acknowledged, that, according to the constant course of the Court, the fund, until that time, is not considered distributable. *After that*, if the Court observes that an executor keeps money in his hands without any apparent reason, but merely for the purpose of using it, then it becomes negligence and a breach of trust, the consequence of which is that the Court will charge the executor with interest (*e*)."

"With respect to the general question of charging executors with interest," observed Sir A. Hart, "there are two things to be kept in view, first, we are not to look so closely into the dates of a running account to calculate interest upon it, as to deter respectable men from undertaking the office of executor; and on the other hand we are not loosely to permit any man, however respectable, to retain the money of others in his hands without making it productive. An executor's duty in this respect is to deal with the trust estate as a provident man would deal with his own, and every provident person makes interest of his money when he has got together a sum which he thinks to be worth while to lay out at interest (*f*)."

(*e*) *Forbes v. Ross*, 2 Cox, 115.

(*f*) *Flanagan v. Nolan*, 1 Moll. 85.

CHAPTER XVII.

THE DUTIES OF TRUSTEES OF RENEWABLE LEASEHOLDS.

UPON this head we shall first examine the preliminary question, in what cases the obligation to renew is imposed by the settlement, and secondly we shall inquire in what manner the trustees are to levy the fines payable upon the renewals.

I. In what cases the obligation to renew is imposed by the settlement.

It might naturally be considered, that, from the very circumstance of the leaseholds being of a renewable character, a settlement of them to several persons in succession would *per se* imply a right in the remainderman to call upon the tenant for life to contribute to the fine (*a*); and indeed Lord Thurlow, in the instance of a lease which had not previously been treated as renewable, observed, "The cases in which the *nature of the estate* or the will of the testator compels a renewal, appear not to apply to the present: where there is *no such custom* or direction, it is in the discretion of the tenant for life to renew or not (*b*)."¹ However it seems to be now established

(*a*) *White v. White*, 4 Ves. 32,
per Lord Alvanley.

(*b*) *Nightingale v. Lawson*, 1 B.
C. C. 443.

generally, that, in a devise of renewable leaseholds without the interposition of a trustee, the remainderman cannot oblige the tenant for life to contribute to the fine (c). And so it was determined even where the devise was expressly made "subject to the payment of all *fin*es, and as they became due yearly and for every year (d)." But as the interest given is in its nature capable of renewal, the Court says, "If the tenant for life do renew, he shall not by converting the new acquisition to his own use derive an unconscientious benefit out of the estate (e)," but, on the remainderman's contributing to the fine, shall be regarded as a trustee, and shall hold the renewed interest upon the trusts of the settlement (f).

Whether the *mere interposition of a trustee* will sufficiently indicate an intention of obliging the tenant for life to renew has never been precisely determined. "In a *devise to trustees*," said Lord Hardwicke, "if *cestui que trust* for life be one of the lives, I should doubt whether such *cestui que trust* could be compellable to contribute; but here all these lives were strangers: *the intent of the testator certainly was, that the lease should continue, and be kept on foot, and something must be done for a renewal, though nothing is mentioned (g).*" Lord Alvanley on one occasion alluded to the point, but said he was not called upon to decide it (h). In a late case, where the devise was to trustees upon trust to permit one to receive the

(c) *White v. White*, 4 Ves. 32, per Lord Alvanley; *S. C.* 9 Ves. 561, per Lord Eldon; *Stone v. Theed*, 2 B. C. C. 248, per Lord Thurlow.

(d) *Capel v. Wood*, 4 Russ. 500.

(e) *Stone v. Theed*, 2 B. C. C. 248, per Lord Thurlow.

(f) *Nightingale v. Lawson*, 1 B. C. C. 440; *Stone v. Theed*, 2 B. C. C. 248, per Lord Thurlow; *Coppin v. Fernyhough*, 2 B. C. C. 291; *Fitzroy v. Howard*, 3 Russ. 225.

(g) *Verney v. Verney*, 1 Ves. 429.

(h) *White v. White*, 4 Ves. 33.

rents for life, with remainders over, "subject to the payment of all taxes, *finés*, and expenses attending the premises," it was held the obligation of renewing the lease was imposed by the will (*i*).

In *Lock v. Lock* (*k*) a testator had devised a college lease of twenty-one years to his wife for life, remainder to her son, she paying 10*l.* per annum to the son *during her life*; and it was held, that, as the testator contemplated the continuance of the lease during the life of the wife, she was bound to renew.

Where leaseholds of this kind are made the subject of a marriage settlement, it may be argued, that, as all the parties who have any interest given them are purchasers, the enjoyment of the tenant for life should be consistent with that of the other subsequent takers.

In *Lawrence v. Maggs* (*l*), the case of a settlement with trustees interposed, but without any mention of renewals, Lord Northington said, "The husband renewed twice; first, when he put in his own life, which was of no benefit to those in the settlement who were to take in remainder after his death; he renewed a second time, and put in his wife's life, and this he does *voluntarily and without there being any directions for it in the settlement*. The renewing the lease with any other life than that of the tenant for life is for the benefit of the remainderman, and he is to be deemed a creditor, keeping down the interest during his enjoyment." The plain implication from which remark is, that in his Lordship's opinion the tenant for life was considered *not* bound to renew.

There appears to be no other authority upon the subject

- (*i*) *Hulkes v. Barrow*, Taml. 264. made for this case in the R. L.
(*k*) 2 Vern. 666. through several years, but the decree has not been found.
(*l*) 1 Ed. 453. Search has been

but what may be collected from Sir W. Grant's observations in *Lord Montfort v. Lord Cadogan*. "The proposition," he said, "that under the marriage settlement it was the duty of the trustees to renew, does not admit a question. *The lease being made the subject of a settlement, it was clearly meant that it should be kept on foot by renewals.* The trustees were to apply so much of the rents and profits as would be necessary for that purpose. They are not in so many words directed to renew, but the means being given, and the purpose expressed, there is no doubt that they were to apply those means to that purpose (m)."

But, if renewable leaseholds be *articled to be settled* on the husband for life, remainder to the wife for life, remainder to the children, the Court will, in executing the settlement, insert the proper directions for renewals. This, it seems, was directly determined in *Graham v. Lord Londonderry* (n); and the case of *Lawrence v. Maggs*, before Lord Northington, was cited in *Pickering v. Vowles*, before Lord Thurlow (o), as establishing the same doctrine; but, it appears by the report taken from Lord Northington's own MS. that the bar were mistaken in this (p). However, Lord Thurlow himself seems to have entertained that opinion, for, in *Pickering v. Vowles*, where the property was articulated to be settled, but there were no directions for renewals, his Lordship said, "It was *intended* the lease should be fully estated, and that the husband and wife should have life estates, and that so fully estated it should go to the children."

(m) 17 Ves. 488; and see *S. C.*
19 Ves. 638.

(n) Cited *Stone v. Theed*, 2 B.
C. C. 246.

(o) 1 B. C. C. 197. The cause
does not appear in R. L.

(p) 1 Ed. 453.

A direction for renewals is sometimes in the form of a *discretionary* power. The instrument may indeed be so specially worded, that the power should be perfectly arbitrary; but, if the proviso be simply that "it shall be lawful for the trustees to renew from time to time as occasion may require and as they may think proper," the clause will be construed, not as conferring an option upon the trustees of renewing or not, but as a safeguard against any unreasonable demands on the part of the lessor (*q*).

II. In what manner the fines for renewals are to be levied by the trustees.

Upon this subject we shall first advert to the cases where the settlor himself has specifically marked out the fund from which the fines are to be raised, and, secondly, we shall examine the rules adopted by the Court, where the settlor himself has omitted to declare any intention.

1. If there be an express trust to provide the fines for renewals out of the "rents, issues and profits," and the leaseholds are terms of years not determinable on lives so that the times of renewal can be certainly ascertained, it will be the duty of the trustees to lay by every year such a proportion of the annual income as against the period of renewal will constitute a fund sufficient for the purpose (*r*); and though the trust be to levy the fines for renewal out of the "rents, issues, and profits, or by mortgage," the annual rents only will in the first instance be applicable, for the authority to mortgage will be considered, not as making it optional with the trustees whether they shall or not affect the interests of the re-

(*q*) *Milsington v. Mulgrave*, 3 Mad. 491; and see *Verney v. Verney*, 1 Ves. 430.

(*r*) *Lord Montfort v. Lord Cadogan*, 17 Ves. 485; *S. C.* 19 Ves. 635.

mainderman by throwing the charge of the renewal upon the *corpus* of the property, but as given for the protection of the *cestuis que trust* in case the amount of the fine should not be otherwise forthcoming (*s*). Should the trustees in event be under the necessity of mortgaging, the Court would call back from the party in possession the amount of the incumbrance thus temporarily incurred (*t*).

Where the leaseholds were annually renewable for twenty-one years, and the custom had been for the lessee annually to grant underleases for twenty years, the tenant for life, as bound to pay the fines to the lessor out of the annual rents and profits, was declared entitled to the fines paid annually by the under-lessees (*u*).

If the trust be to raise the fines for renewal out of the "rents, issues and profits," and the leaseholds are either for lives or for years determinable on lives, it seems the expenses of renewal must still be cast upon the *annual* rents, though, from the uncertainty of the time, the trustees cannot be sure they shall have accumulated an adequate fund.

Thus, in *Stone v. Theed* (*x*), where was a gift to trustees of freeholds and leaseholds and personal estate upon trust (subject to annuities) for a person for life, with remainders over, and the testator "directed that his trustees should from time to time renew the lease and add new lives, if they could obtain such lease, and empowered his said trustees to place out at interest the overplus of the rents of his real and leasehold estates in government

(*s*) *Milsintown v. Earl of Portmore*, 5 Mad. 471; *Milles v. Milles*, 6 Ves. 761.

(*u*) *Milles v. Milles*, 6 Ves. 761.

6 Ves. 761.

(*x*) 2 B. C. C. 243.

(*t*) 5 Mad. 472, *per* Sir J.

or real securities," Lord Thurlow held that the annual rents only were to be so applied, observing, "he must consider the thing bequeathed to be the subsisting lease, subject to renewal. Suppose it were the case of an estate to which an embankment was necessary: there could be no doubt it was a clear indication of intention that the first trust was to keep the estate productive by embankment or other buildings, or, in the present case, by a very strict analogy, by keeping the leases renewed. It was objected, 'Could the testator be understood to make a provision which might exhaust the estate of the first taker?' But the expressions were as strong as if he had said expressly he meant the lease to be kept up, and he must be understood to sacrifice the intent of a provision for the first taker to the original intent of keeping up the estate."

In *Allan v. Backhouse* (y) a testator devised leaseholds and freeholds to trustees, and directed the fines to be levied "out of the rents and profits of the leaseholds, or out of the rents and profits of the freeholds," and Sir T. Plumer considered the direction did not mean to point out the *fund* from which the fines were to be eventually paid, but only the *mode* by which they were to be raised at the instant; that, as a gross sum might at any moment be demanded by the lessor, who was not bound to wait, the trustees, by the expression "rents and profits," were not confined to the annual rents, but were authorised to sell and mortgage; that the tenant for life and the remainderman should afterwards contribute to the fine in the usual proportions. An appeal was presented to Lord Eldon, by whom the decree was affirmed (z).

(y) 2 V. & B. 65.

(z) Jac. 631.

In a late case (*a*), where there was a devise of renewable leaseholds to trustees upon trust to raise the fines out of the "rents, issues, and profits," and subject thereto upon the same trusts as the testator's freeholds, Sir J. Leach observed upon the discrepancy between *Stone v. Theed* and *Allan v. Backhouse* (*b*), and, so far as the two cases were applicable to the question before him, followed the authority of the former. "The first trust," he said, "is, that the trustees by and out of the rents and profits shall from time to time renew the several leases as occasion may require: the trust as to the renewals overrides all beneficial interest in the lease, and such interest cannot take effect until this trust be performed."

Though the fine for renewal be thrown expressly upon the *annual* rents, the trustees may still by the urgency of the occasion be obliged in the first instance to resort to a mortgage, as where in the case of leaseholds for lives the renewal fine is to be levied immediately upon the death of the testator before any rents have accrued (*c*). "But I am of opinion," said Sir John Leach, "the trustees would be entitled afterwards to retain from the tenant for life the perception of the annual rents and profits until the mortgage was satisfied (*d*)."

On a reference to the Master by Sir J. Leach, how a fund for payment of fines on the renewals of leaseholds for lives could best be secured, the Master proposed in his report, that each of the lives, upon which the leases were held, should be insured against the life of the tenant for life in a sum sufficient to cover the amount of the fine, the premiums upon the policies to be paid out of the an-

(*a*) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 111. (*c*) See Id. 121.
(*b*) Id. 121. (*d*) Id. 123.

nual rents and profits (*e*). Perhaps a more convenient mode of raising the fines could not be devised, and a trustee under similar circumstances would scarcely incur a risk in following the precedent of the Court.

If, as in the preceding cases, a portion of the *annual* rents and profits be destined by the settlor to defray the expenses of renewals, then, should it happen from the unwillingness or incapacity of the lessor that no renewal can be obtained, the sums, which would have been raised, will not, it seems, merge for the benefit of the tenant for life, but will belong to the person who would have been the gainer by the renewal (*f*).

If a trustee (*g*), or tenant for life in the situation of a trustee (*h*), fail in his duty to apply the given fund, the remainderman may call for a compensation from such trustee, or tenant for life, or their assets. But when, by the permission of the trustee, the tenant for life has been in the full enjoyment of the rents and profits without deduction for renewals, though the trustee is primarily answerable to the remainderman, yet the tenant for life, who has had the actual pernancy, must make it good to the trustee (*i*).

2. Next, it may happen that renewable leaseholds are devised to trustees with a direction, either expressed or implied, to keep the leases continually renewed, but without any declaration of intention from what fund the settlor meant the expenses should be levied.

The general rule in this case is, that the tenant for life

(*e*) *Id.* 124.

(*g*) *Lord Montfort v. Lord Ca-*

(*f*) See *Colegrave v. Manby*, 6 Mad. 86, 87; *S. C.* 2 Russ. 252;

dogan, 17 Ves. 485; *S. C.* 19 Ves. 635.

Bennett v. Colley, 2 M. & K. 231; but see *Richardson v. Moore*, and *Tardiff v. Robinson*, cited *Colegrave v. Manby*, 6 Mad. 82, 83.

(*h*) *Colegrave v. Manby*, 6 Mad. 72; *S. C.* 2 Russ. 238.

(*i*) *Lord Montfort v. Lord Ca-*
dogan, *ubi supra*.

and the remainderman shall contribute in proportions, and in what proportions they shall so contribute we now proceed to examine.

If the leases be for *years*, and the times of renewal *certain*, a due contribution would be insured by the reservation of an annual even sum out of the rents and profits (*k*): and where the leases are for lives, or for years determinable on lives, the trustees would probably be justified, did they insure out of the same fund the lives of the *cestuis que vie* against the life of the tenant for life in the amount of the renewal fine (*l*).

Should there be the necessity of renewing before any rents have accrued, or should the trustees have failed to make provision for it by a reservation of the annual rents, the money must then be advanced in the first instance by the tenant for life or the remainderman, or, if they have not the ability, must be raised out of the estate by mortgage (*m*), and the tenant for life and remainderman must, according to the present rule of the Court, apportion the fine between them at the tenant for life's decease.

The old rule of contribution was, that the tenant for life should advance one-third, and the remainderman two-thirds (*n*); but in *Nightingale v. Lawson* (*o*) the

(*k*) See *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121. per Sir J. Leach; *Lock v. Lock*, 2 Vern. 666, R. L. 1710 B. fol. 120; *Verney v. Verney*, 1 Ves. 428;

(*l*) See Id. 124; and see *Playters v. Abbott*, Id. 106. *Limbroso v. Francia*, cited Ib.; *Graham v. Lord Londonderry*, cited *Stone v. Theed*, 2 B. C. C. 246; and see *Rowel v. Walley*, 1 Ch. Rep. 218; *Ballet v. Spranger*, Pr. Ch. 62; *Cornish v. Mew*, 1 Ch. Ca. 271.

(*m*) See *Buckeridge v. Ingram*, 2 Ves. jun. 666; *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 121; *Allan v. Backhouse*, 2 V. & B. 72.

(*n*) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 118, 555. (*o*) See *White v. White*, 9 Ves. 555.

question was put by Lord Thurlow, "Is a tenant for life at the age of 99, whose title accrued in possession when he was 98, to pay one-third—a great deal more than any possible enjoyment? According to that rule, a man of the age of 99, who has the enjoyment only of ten days, pays as much as a man of 25."

It might possibly be thought reasonable that the proportion of the expense to fall upon the tenant for life should be regulated by his actual age and probable duration of life; but accident might render such a course unjust to the one party or the other, as the tenant for life happened to live a longer or shorter period than was allowed by the calculation (*p*), and the Courts, it was observed by Lord Brougham, have made it a maxim never to admit an estimate which the events may afterwards falsify (*q*).

Lord Alvanley adopted the rule (*r*), and from the case of *Lawrence v. Maggs* it would seem that Lord Northington had before acted upon the same principle (*s*), that the tenant for life should merely *keep down the interest* of the fine: but Lord Eldon said, "he could not agree to that: in the case of tenant for life and remainderman in *tail* or in *fee*, the *inheritance* being charged with the mortgage, it was fair the tenant for life should only keep down the interest, for the natural division was, that he who had the *corpus* should take the burden, and he who had only the fruit should pay to the extent of the fruit of the debt; but leases, whether for lives or years, were in their nature temporary, and therefore the position that the tenant for

(*p*) *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. 119, per Sir J. Leach. (*r*) *Buckeridge v. Ingram*, 2 Ves. jun. 652, see 666; *White v. White*, 4 Ves. 24, see 33.

(*q*) *Bennett v. Colley*, 2 M. & K. 234. (*s*) 1 Ed. 453, see 455.

life was bound to pay the interest was to be understood with this qualification, that he was further bound to contribute a due proportion of the principal according to the benefit he derived from the renewed interest (*t*)."

The rule now in operation was first clearly laid down by Lord Thurlow in *Nightingale v. Lawson* (*u*), a case, said Lord Eldon, who was one of the counsel in it, to which, from the intricacy of the subject, the reports have failed to do justice (*x*).

The circumstances may be very briefly stated as follows:—A widow, tenant for life of a term which had twelve years to run, renewed for a further term of twenty-eight years to commence from the expiration of the twelve years, and afterwards renewed for the additional term of fourteen years to commence from the expiration of the twenty-eight years. The widow lived through the original term of twelve years, and through nine of the renewed term of twenty-eight years. The question was raised after the death of the widow, in what proportions the tenant for life and the remainderman should contribute to the fines. The following points were resolved by Lord Thurlow, after very anxious, frequent, and grave consideration of the subject (*y*), and have ever since been acquiesced in by the Courts.

1. "That, as the widow had lived nine years after the expiration of the twelve, leaving nineteen years to run of the twenty-eight, the Master ought to take the sum paid by her for the renewal of the lease as the value of the term purchased, that is, of the term of twenty-eight years,

(*t*) *White v. White*, 9 Ves. 560.

(*y*) See *White v. White*, 9 Ves.

(*u*) 1 B. C. C. 440.

560.

(*x*) *White v. White*, 9 Ves. 556.

to commence at the expiration of the twelve years; he should then consider the value of the term of nine years after the existing term, and what the term of nineteen years after the existing term and the nine years was worth, and the latter was the proportion to be paid by the remainder man (z).” Upon which resolution Lord Eldon thus comments:—“ It was first considered,” he said, “ what the interest of the tenant for life was in that term which had to run out at the time of the renewal, and then what benefit the tenant for life had received by the enjoyment of the renewed term from the period when the old term would have expired; and Lord Thurlow determined that the remainderman took that interest in the renewed term which was *ultra* so much of the renewed term as expired in the lifetime of the person who renewed, and the value of that interest he made the remainderman pay (a).”

2. “ That, as to the *kind of interest* to be allowed, *simple* interest would not be a satisfaction, as the widow had laid out her money totally, and the value of the lease was calculated upon the ground of compound interest: compound interest was therefore to be computed upon the proportional value of the nineteen years’ term to the whole expense of renewal (b).”

3. “ That, as to the *rate of interest*, in computing compound interest, you go upon the idea that the interest is paid upon the exact day and immediately laid out; but, as this was impossible, it would be sufficient to compute interest at 4 per cent.”

(z) See *Coppin v. Fernyhough*, *Duke of Marlborough*, 2 M. & K. 2 B. C. C. 291; *Barnard v. Heaton*, cited *White v. White*, 4 Ves. 118. (a) *White v. White*, 9 Ves. 558. 29; *Playters v. Abbott*, 2 M. & K. 108; *Earl of Shaftesbury v.* (b) See *White v. White*, 4 Ves. 35, 36; S. C. 9 Ves. 557, 558.

4. "That such interest was only to be paid till the widow's death, for, after that, her executors had the demand upon the remainderman, and it became a common debt, and must carry simple interest only."

5. "With respect to the second renewal, as the widow had not lived to enjoy any part of that term, her executors were entitled to the whole of the expenses, with interest to be computed on the same principle as before (c)."

In this case it will be observed, the *tenant for life* had disbursed the fine, and, the payment being a charge upon the property, the widow was in no danger of eventually losing her demand. But, where the tenant for life has not the means of renewing, but the remainderman comes forward with the money, if the contribution is to be suspended till the death of the tenant for life, it may happen, that, when the proportions can at last be ascertained, the estate of the tenant for life may be insolvent, and so the contribution be lost. "I admit," says Lord Eldon, "there is this difficulty in the case; but perhaps from the nature of the thing it cannot be helped: the utmost extent you can go is to make the tenant for life give security for the sum which may eventually be due (d)."

There occurs, also, this other difficulty, viz., how to apply the principle to the case of leaseholds for *lives*. The new *cestui que vie* may die in the lifetime of the original *cestui que vie*, and then no actual benefit accrues either to the tenant for life or to the remainderman. If

(c) *Coppin v. Fernyhough*, 2 558, 559; *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K. B. C. C. 291.

(d) See *White v. White*, 9 Ves. 122.

the tenant for life paid the fine, is the remainderman to contribute nothing, because he took no benefit? If the remainderman paid the fine, is the tenant for life to contribute nothing, because he can excuse himself under the same plea?

From the nature of leaseholds for lives it seems difficult to discover any better principle than one of the following:—

First, That the tenant for life and the remainderman should contribute according to their *chance of benefit at the time of the renewal*, in which case the proportions would be settled thus:—The chance of benefit to the tenant for life is the value of the new life commencing from the death of the last surviving original *cestui que vie*, and determining on the death of the tenant for life. The chance of benefit to the remainderman is the value of the new life commencing on the death of the original *cestuis que vie* after the death of the tenant for life. In the proportion of these two values would be the respective contributions.

Secondly, That the remainderman's proportion should be regulated by the *actual benefit derived*. Thus, if the new *cestui que vie* die in the lifetime of any of the original *cestuis que vie* or of the tenant for life, the remainderman takes no benefit and has nothing to pay. In this case the tenant for life is the loser. Should the new *cestui que vie* survive the original *cestuis que vie* and also the tenant for life, the value of the new life should be taken at the tenant for life's death, and that interest be paid for by the remainderman. It might happen that the original *cestuis que vie* and the tenant for life might die soon after the renewal, and then the estimated value of the new life would be greater than the whole fine. In

such a case the tenant for life would be a gainer. Thus the tenant for life might sometimes be a gainer, sometimes a loser: the remainderman would never either gain or lose, but would pay the exact value of the interest which he actually took.

The only authority upon the subject is a *dictum* of Lord Eldon, which, however, is so obscurely worded, that little light can be gained from it.

"There is no difference," he said, "between a renewable term for years and a lease for lives renewable. In the former case the difficulty does not arise so much from the probable value of a term certain, as upon an estate for lives in estimating what is the value of that life which may survive the three *cestuis que vie*, and that interest to be paid for by the remainderman, as the case may happen that one, two, or three lives may determine in the life of the man entitled to the beneficial interest (e)."

Where the legal estate of renewable leaseholds is devised without the interposition of a trustee, but the testator at the same time directs, either expressly or by implication, that the leases shall be renewed, the tenant for life is then himself a trustee (f), and as such is compellable to obtain renewals (g), and ought before applying for a renewal to consult the remainderman (h).

It has been said, that if from the threats or acts of the tenant for life there appears the intention of suffering the lease to expire, the Court would appoint a receiver of the estate to provide a fund for the renewal (i); and

(e) *White v. White*, 9 Ves. 559. 24.

(f) *White v. White*, 5 Ves. 554. (h) *White v. White*, 5 Ves. 554.

(g) *Lock v. Lock*, 2 Vern. 666; (i) See *Bennett v. Colley*, 2 M. and see *White v. White*, 4 Ves. & K. 233.

that if the tenant for life has already allowed the period of renewal to pass, the rents and profits will be sequestered for either procuring a renewal (*k*), or finding the remainderman a compensation (*l*). But no suit for damages can be effectually prosecuted before the tenant for life's decease; for so long as it remains uncertain how much of the renewed term will survive to the remainderman, the amount of the injury done to him cannot be ascertained (*m*). It follows that the mere forbearance of the remainderman to bring a suit during the continuance of the life estate cannot be construed into *laches* or acquiescence (*n*).

(*k*) See *S. C.* 5 Sim. 192. 490.

(*l*) *S. C.* 5 Sim. 181; 2 M. & K. 225; and see *Lord Montfort v. Lord Cadogan*, 17 Ves.

(*m*) *Bennett v. Colley*, 5 Sim.

181; *S. C.* 2 M. & K. 225.

(*n*) *S. C.*

CHAPTER XVIII.

THE DUTIES OF TRUSTEES TO PRESERVE CONTINGENT
REMAINDERS.

SETTLEMENTS which embrace limitations to trustees to preserve contingent remainders are usually penned in one of the two following forms : either, first, the estate is settled to the use of trustees and their heirs during the life of the parent upon trust to preserve contingent limitations with remainders over ; or, secondly, it is settled to the use of the parent for life, with remainder to trustees and their heirs during the life of the parent upon trust to preserve contingent limitations, with remainders over.

In the first form of settlement the object in view by the interposition of trustees is not merely to preserve the contingent estates from the parent's *legal* power to destroy them, but also to prevent the exercise of any undue influence of the father over the son, which, if the father were tenant of the first freehold, he might be base enough to practise in order to induce the son to join in barring the entail for purposes not authorized by the spirit of the settlement (*a*).

In the second form it is imposed upon the trustees, as

(*a*) The law upon the latter Act, as will be noticed at the end of the chapter.
branch is now most materially altered by the late Fines and Recoveries

before, to preserve the contingent limitations; but as the freehold in possession is vested in the parent, the trustees can have no power to prevent a recovery by the father and son so soon as the son has attained the age of twenty-one; but should the tenant for life commit a forfeiture, and so the freehold in possession become vested in the trustees, it would then be their duty, though the settlor himself might not have contemplated such a purpose, not to allow the interests of the child to be prejudiced by any improper exercise of the authority of the parent.

The duties of these trustees may be regarded, first, as the case stands before the eldest son has attained twenty-one; and, secondly, as the obligations of the trustees are varied by the occurrence of that event.

I. *Until the eldest son has attained twenty-one* the duty of the trustees not to join in any act to destroy the contingent remainders is *express* and *imperative* (b). "When trustees," it was once observed by the Court, "are appointed to preserve an estate in a family and for no other purpose, and they, instead of pursuing it, do a wilful act with an intent and in order to destroy it, how can this be otherwise than a plain breach of trust, or how can it be rendered clearer than by barely putting the case? Should the Court hold it no breach of trust, or pass it by with impunity, it would be making proclamation that the trustees in all the great settlements in England were at liberty to destroy what they had been

(b) *Mansell v. Mansell*, 2 P. W. 491, *per eundem*; *Tipping v. Pig-*
678; *Moody v. Walter*, 16 Ves. 491, *per eundem*; *gott*, 1 Eq. Ca. Ab. 385, *per Lord*
302 & 307, *per Lord Eldon*; *Harcourt*; *Pye v. Gorge*, 1 P. W.
Biscoe v. Perkins, 1 V. & B. 128, *per eundem*.

intrusted only to preserve. Where an estate is limited to A. for life, remainder to his first and other sons in tail, though it be a plain wrong and *tort* in A. to do any act which will destroy those remainders before the birth of a son, notwithstanding his legal power of doing so, yet, as in this case there is no trustee, there can be no trust, nor consequently any breach of trust, and therefore a Court of equity may have no consusance of such a case nor handle for relief, the matter being left purely at the common law. To prevent this inconvenience, the remedy of appointing trustees was invented on purpose to disable the tenant for life from doing such an injury to his issue, which is not a very old invention. Now as it was a *tort* in the tenant for life where there were no trustees to destroy contingent remainders, so must it more plainly be one in trustees to join in the destruction of them being contrary to their trust, upon which account only is such act of theirs punishable in a court of equity (c)."

It was formerly contended, that in settlements upon *marriage*, or for other *valuable consideration*, it would be a breach of duty to join in the destruction of the remainders, but that in limitations created by *will* or other *voluntary settlement* the same doctrine was not applicable; but in *Mansell v. Mansell* (d) the distinction was unhesitatingly over-ruled, for "whether the trustee did it on a voluntary conveyance or not was immaterial, for still every trustee ought to be faithful to his trust (e)."

If the trustees destroy the contingent remainders in favour of a volunteer or purchaser with notice, the specific estate may be followed into the hands of such vo-

(c) *Mansell v. Mansell*, 2 P. W.
680.

(d) Id. 678.
(e) Id. 683.

lunteer or purchaser; but if the trustees pass the property into the hands of a purchaser without notice, then, as the identical estate cannot be recovered, the trustees will be decreed to buy other lands of equal value to be settled to the same uses (*f*).

Where the ultimate limitation of a marriage settlement is to the *heirs of the husband*, if the trustee join with the husband and wife in the destruction of that remainder, and there is no issue of the marriage, the heir of the husband is not entitled to come upon the trustee to compensate him for the loss of the estate: relief is extended to those only who come in and claim as *purchasers*, as first and other sons; not to all the subsequent remainder-men, as the heirs of the body of the husband, or his right heirs, who are regarded in the light of volunteers, and not to be aided in a Court of equity (*g*).

And in a limitation to trustees and their heirs during the life of the husband, remainder to the heirs of the body of the husband, remainder to the husband in fee, the *issue of the marriage* cannot claim compensation for a breach of trust during the lifetime of the husband, for *nemo est hæres viventis* (*h*).

As any disturbance of the settlement before the eldest son has attained twenty-one is a clear breach of trust, it follows that even the Court cannot sanction such a proceeding, though very particular circumstances may be alleged in support of the reasonableness of the demand. Thus, where the plaintiff and his wife had been married twelve years without issue, and the prayer of the bill was

(*f*) *Mansell v. Mansell*, 2 P. W. 681, *per cur.*; *Parkes v. White*, 11 Ves. 209, see 220, 286. (*g*) *Tipping v. Piggott*, 1 Eq. Ca. Ab. 385. (*h*) *Else v. Osborn*, 1 P. W. 387.

that part of the estate might be sold for payment of debts, and the trustees submitted to act as the Court should direct; Lord North said " he could not justify to decree a breach of trust: he had known where people had been married near twenty years without issue, and afterwards had children (i)."

But two cases are to be noticed, in which the Court did conceive itself justified, from the great particularity of the circumstances, in departing from this rule.

The first is the case of *Platt v. Sprigg* (k), in which R. mortgaged lands to M. for 1000 years to secure 1000*l.* and interest, and afterwards upon his marriage made a settlement, subject to the incumbrance, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to the wife for life, remainder to the first and other sons. The mortgagee threatened to enter, and the lands were in consequence artioled to be sold. The purchaser filed a bill praying specific performance, and that the trustees might be directed to join in the conveyance, and so it was decreed by the Court. But the ground of this decision was, that, as the mortgagee was not bound by the subsequent settlement, he might have foreclosed the estate, and so have precluded the parties entitled under the settlement from all interest in the property; but if the lands were sold, the surplus proceeds, after discharging the mortgage, would be so much gained to the uses of the settlement. Thus the principle acted upon was not that trustees to preserve contingent remainders might join in the destruction of them, but that the best mode of executing the trust, under the circumstances, was to substitute a

(i) *Davies v. Weld*, 1 Vern. 181; S. C. 2 Ch. Ca. 144.

(k) 2 Vern. 303.

sale for a foreclosure, and to lay out the surplus in lands to be settled to the same uses (*l*).

In the case of *Basset v. Clapham* (*m*) A., after marriage, made a voluntary settlement of lands to himself for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, remainder to himself in fee, and afterwards, becoming insolvent, executed a conveyance of the same premises to trustees for payment of his debts. The creditors filed a bill for the purpose of obtaining a sale, and prayed that the trustees might join in destroying the contingent remainders. Sir Joseph Jekyll at first refused the application, saying there was no precedent for such a direction; but afterwards, a precedent being produced to him, he granted the relief, "it being," he said, "at the suit of creditors, and for raising money for payment of debts."

II. Of the duties of trustees to preserve contingent remainders *after the eldest son has attained twenty-one*.

Upon the occurrence of this event the joining or not joining of the trustees in the destruction of the remainders ceases to be *imperative*, and becomes *matter of discretion*: they are said to be *honorary* trustees (*n*), that is, bound in *honour* only to decide on the most proper and prudential course. However the Court, if application be made to it, will, as the general trustee in these cases, exercise the discretion vicariously for the trustees (*o*); and, where the trustees have abused the dis-

(*l*) See *Barnard v. Large*, 1 B. V. & B. 492; *Woodhouse v. Hos-*
C. C. 536; *Moody v. Walters*, 16 *kings*, 3 Atk. 24.
Ves. 303.

(*m*) 1 P. W. 358.

(*o*) See *Moody v. Walters*, 16
Ves. 307; *Biscoe v. Perkins*, 1 V.

(*n*) See *Barnard v. Large*, 1 B. & B. 492.
C. C. 535; *Biscoe v. Perkins*, 1

cretion, will, whatever may have been the ancient doctrine (*p*), hold them responsible as for a breach of trust (*q*).

The only case in which the Court has directed the contingent limitations to be destroyed, has been where the object of the parties was to re-settle the property upon the marriage of the eldest son (*r*). Thus in *Winnington v. Foley* it was reported by the Master that the marriage of the eldest son was beneficial, and that it was necessary a new settlement should be made of the estate, and Lord Chancellor Parker said, "It would be greatly mischievous if the trustee should stand out, and not join with the father and son in cutting off the old settlement and making a new one: it was plainly for the benefit of the family; for by the intended settlement the son was to be but tenant for life, instead of tenant in tail;" and so decreed the trustee to join in the recovery (*s*).

Where the Court has been called upon to disturb the settlement, and for no other purpose than merely to disturb it, the application has of course been refused (*t*).

And *a fortiori* the Court would not lend its sanction if the object of the parties were such as the Court ought positively to discourage, as where the intention of defeating the settlement is to pay off the father's incumbrances at the expense of the child (*u*). "The reason of making

(*p*) See *Symonds v. Tattam*, 1 Atk. 614; *Dormer v. Fortescue*, 3 Atk. 129.

(*q*) *Barnard v. Large*, 1 B. C. C. 535, *per* Sir T. Sewell.

(*r*) *Frewin v. Charleton*, 1 Eq. Ca. Ab. 386; *Townsend v. Lawton*, Sel. Ch. Ca. 71; *Barnard v. Large*, 1 B. C. C. 536, *per* Sir T. Sewell; and see *Symance v. Tattam*, 3 Atk.

(*s*) 1 P. W. 536; and see *Townsend v. Lawton*, 2 P. W. 380.

(*t*) *Barnard v. Large*, 1 B. C. C. 534.

(*u*) *Townsend v. Lawton*, 2 P. W. 379; *Woodhouse v. Hoskins*, 3 Atk. 22.

the father tenant for ninety-nine years only," said Lord Hardwicke, "is in order to preserve the estate: it may likewise be the design of such settlements to prevent the father's influence over the son when of age, if the father was seised of the freehold, to get the son to destroy the settlement. Here the intention is to pay the debts of the father. It is the very case which was intended to be prevented by the trust (*x*)." And Sir T. Sewell observed, "Trustees to preserve contingent remainders, who have the freehold in possession, are appointed for two purposes—one to preserve the estate against the father's power to destroy it, and the other to prevent the injury of any improper influence of the father over the son to induce him to join in destroying the entail upon cases when he ought not to join (*y*)."

From the conduct of the Court on these occasions the trustee may infer the duties that are imposed upon himself; but if the trustee should exercise his discretion where the Court would not have interfered, it does not therefore follow that he is liable as for a breach of trust: it is one thing for the Court to say the object of barring the entail is not so clearly beneficial as to justify the Court in overturning the settlement; it is another to hold the object so absolutely mischievous as to make the trustee responsible on the ground of a breach of duty (*z*).

The preceding remarks have been general, without any distinction taken between marriage settlements and wills; but upon principle, perhaps, the two instruments ought

(*x*) *Woodhouse v. Hoskins*, 3 & B. 491; *Woodhouse v. Hoskins*, 3 Atk. 24; *Barnard v. Large*, 1

(*y*) *Barnard v. Large*, 1 B. C. B. C. C. 535; *Moody v. Walters*, C. 535. 16 Ves. 309.

(*z*) See *Biscoe v. Perkins*, 1 V.

not to be confounded. The object of a marriage settlement is to preserve the estate in the family, and, were it not for the rule against perpetuities, the limitation to the eldest son would be not in tail, but for life, with remainder to his eldest son ; and if on the marriage of the eldest son the trustee joins in a recovery for the purpose of resettling and further tying up the estate, he is undoubtedly acting in conformity with the original intention. But in a will, as all the devisees are volunteers, and the trustee does not hold upon trust for the first tenant in tail more than for the successive remaindermen, if the trustee enable an eldest son to get possession of the fee simple at the expense of the remainderman's interest, it might be argued he has overstepped his duty, and ought to answer for it as for a breach of trust. The distinction was thus observed upon by Sir T. Sewell in the case of *Barnard v. Large* (a). "The trustee," he said, "though properly appointed to preserve contingent remainders only, is in effect a trustee for all vested as well as contingent remainders, and has been so considered ; but with respect to vested remainders, if they have been to remote relations upon *settlements*, where the persons to whom they are limited are not the immediate objects of the parties, or where they stand in opposition to the first tenant in tail desiring a reasonable benefit consistent with the intention of the creators of the limitations, their pretensions have not been much considered : in a *will* all take as volunteers, and are equally to be considered."

But this distinction, though evidently founded upon principle, and supported by the authority we have mentioned, was not noticed by Lord Eldon in the discussion of *Biscoe v. Perkins*, the case of a devise (b).

(a) 1 B. C. C. 535.

(b) 1 V. & B. 485.

The law upon the duties of trustees to preserve contingent remainders has recently undergone great alterations from the provisions of the act for the abolition of fines and recoveries (c).

By the 15th section it is declared, that every tenant in tail, whether *in possession, remainder, contingency or otherwise*, shall have power to dispose of the lands entailed for an estate in fee simple absolute; but by the 40th and two following sections, the disposition must be by *deed inrolled*, and must be made with the *consent of the protector of the settlement*.

Under the old law the key of the settlement was in the hands of the person who was owner of the freehold in possession; but now, by the 32nd section, any settlor entailing lands may *appoint* any number of persons *in esse*, not exceeding three and not being aliens, to be protectors of the settlement, and may perpetuate the protectorship by means of a power of appointment of new protectors. If the settlor has not taken advantage of this permission, then, by the 22nd section, if there be subsisting under the settlement any estate for years determinable on the dropping of a life or lives or any greater estate (not being an estate for years) prior to the estate tail, the owner of such prior estate, or of the first of such prior estates if more than one, or *the person who would have been owner had he not disposed of his interest*, is constituted the protector of the settlement; but, by the 27th section, no dowress, *bare trustee*, heir, executor, or administrator shall be protector. However, by the 31st section, it is enacted, that “where *under a settlement made before the passing of the act* the person who un-

(c) 3 & 4 Will. 4, c. 74.

der the old law should have made the tenant to the *præcipe* shall be a *bare trustee*, such trustee during the continuance of the estate conferring the right to make the tenant to the *præcipe* shall be the protector ; but, by the 36th section, the protector of a settlement shall not be deemed to be a *trustee* in respect of his power of consent, and a Court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving his consent as a breach of trust.

Thus, at the present day, as regards settlements made *since* the passing of the act, a bare trustee cannot be protector in any case ; and, as regards settlements made *before* the passing of the act, though the trustee may still continue protector, he is not accountable to a Court of equity for the exercise of his discretion.

CHAPTER XIX.

THE DUTIES OF TRUSTEES FOR SALE.

THE law upon this head may be conveniently distributed into two branches : First, The general duties of trustees for sale ; and, Secondly, The disability of trustees for sale to become purchasers of the trust property.

I. Of the general duties of trustees for sale.

It need scarcely be observed that trustees for sale, whether expressly such or by implication, are authorized to enter into contracts without the previous sanction of the Court (*a*) ; but where a bill has been filed for the execution of the trust, *that* attracts the jurisdiction of the Court, and the trustee would not be justified in proceeding to a sale by act *in pais* (*b*).

The trustee will remember that he is bound by his office to bring the estate to a sale under every possible advantage to his *cestui que trust* (*c*), and, in the case of several *cestuis que trust*, with a fair and impartial at-

(*a*) *Earl of Bath v. Earl of Bradford*, 2 Ves. 590, *per* Lord Hardwicke. 676; and see *Drayson v. Pocock*, 4 Sim. 283.

(*c*) *Downes v. Grazebrook*, 3

(*b*) *Walker v. Smalwood*, Amb. Mer. 208, *per* Lord Eldon.

tention to the interests of all the parties concerned (*d*). If the trustee, or those who act by his authority, fail in reasonable diligence in the management of the sale, as if they contract under circumstances of haste and improvidence, or contrive to advance the interests of one party at the expense of another, the trustee will be personally responsible for the loss to the suffering party (*e*); and the Court, however justifiable the conduct of the purchaser, will refuse at his instance to compel the specific performance of the agreement (*f*).

And a trustee who takes no active part in the business cannot excuse himself by saying he had nothing to do with the conduct of the other to whom the management was confided; for where several trustees commit the entire administration of the trust to the hands of one, they are all equally responsible for the faithful discharge of their joint duty by that one whom they have substituted (*g*).

The trustees will be allowed a reasonable time for disposing of the estate; and though the instrument creating the trust direct them to sell "with all convenient speed," that is no more than is implied by law, and does not render an immediate sale imperative (*h*).

The trustees of a term in a marriage settlement were

(*d*) *Ord v. Noel*, 5 Mad. 440, 292; and see *Hill v. Buckley*, 17 Ves. 394.
per Sir J. Leach; and see *Anon. Case*, 6 Mad. 11.

(*e*) See *Pechel v. Fowler*, 2 Anst. 550. (*g*) *Oliver v. Court*, 8 Price, 166, per Lord Chief Baron Richards; *In re Chertsey Market*, 6 Price, 285, per eundem.

(*f*) *Ord v. Noel*, 5 Mad. 440, per Sir J. Leach; *Turner v. Harvey*, Jac. 178, per Lord Eldon; *Bridger v. Rice*, 1 Jac. & Walk. 504.
74; *Mortlock v. Buller*, 10 Ves. 504.
(*h*) *Buxton v. Buxton*, 1 M. & C. 80; *Garrett v. Noble*, 6 Sim. 504.

directed, after the death of the husband, to levy and raise by mortgage, sale, or other disposition of the estate, if there should be more than three children, the sum of 10,000*l.* for their portions, the shares of the sons to be vested in and payable to them at the age of 21, and the shares of the daughters at 21 or marriage; and it was provided that no mortgage should be made until some one of the portions should become payable: the Vice Chancellor held that on the death of the husband, four children having attained 21 and three being under age, the trustees might raise the whole 10,000*l.* "It is objected," he said, "that some of the portions may become diminished in amount: the answer to that is, that the Court considers the investment in the three per cent. consols as equivalent to payment. If there is any rise in the funds, the children under age will have the benefit of it (*i*)."

A trustee for sale will of course inform himself of the real value of the property, and for that purpose will, if it be necessary, employ some experienced person to furnish him with an estimate (*k*).

And as a trustee, like any ordinary vendor, is bound to make the purchaser a good title (*l*), it would be prudent, before proceeding to the execution of the trust, to take the opinion of some professional person whether a good title can be deduced. Should the contract for sale be unconditional and the title prove bad, the purchaser in a suit for specific performance would be allowed his

(*i*) *Gillibrand v. Gould*, 5 Sim. 149.

(*l*) *White v. Foljambe*, 11 Ves. 343, 345, *per* Lord Eldon; and see

(*k*) See *Oliver v. Court*, 8 Price, 165; *Campbell v. Walker*, 5 Ves. 680.

costs against the trustee (*m*), though the trustee, where his conduct was blameless, might charge them upon the trust estate under the head of expenses.

If lands be devised to trustees in trust to sell for payment of debts, and subject to that charge to A. for life without impeachment of waste, with remainders over, the trustees must not raise the money by a sale of timber, which would be a hardship on the tenant for life, but by a sale of part of the estate itself; and should they have improperly resorted to a fall of timber, the tenant for life would have a charge upon the lands to the amount of the proceeds (*n*).

The sale may be conducted by public auction or private contract, as the one or the other mode may be most advantageous according to the circumstances of the case (*o*).

The trustee cannot without responsibility delegate the general trust for sale (*p*); but there seems no objection to the employment of agents by him, where such a course is conformable to the common usage of business, and the trustee acts as prudently for the *cestui que trust* as he would have done for himself (*q*).

If the trustee think a sale by auction the more eligible mode, he must see that all proper advertisements are made, and due notice given; but it was ruled in *Pechel v. Fowler* (*r*), that a *cestui que trust* could not by alleging the want of these preliminary steps obtain an injunction

(*m*) *Edwards v. Harvey*, Coop. 40.

(*n*) *Davies v. Westcomb*, 2 Sim. 425.

(*o*) See *ex parte Dunman*, 2 Rose, 66.

(*p*) *Hardwick v. Mynd*, 1 Anst. 109.

(*q*) *Ex parte Belchier*, Amb. 218; and see *Ord v. Noel*, 5 Mad. 438.

(*r*) 2 Anst. 549.

against the sale; for, the trustee being personally responsible to the *cestui que trust* for any damage in consequence, the court could not regard it as a case of irreparable injury. However, in a more recent case, where a mortgage deed contained a power of sale, and the mortgagor, alleging that due notice had not been given, applied for an injunction against the sale, though Sir John Leach at first thought, that, as the plaintiff might give notice to the purchaser of the institution of the suit, it was better there should be an additional party to the cause than a possible injury be risked to the mortgagee by the interruption of the sale, yet, it afterwards appearing that the power was limited to a trustee, and that the mortgagor had not been apprised of the intended sale, his Honor granted the injunction. "It was the duty," he said, "of the trustee to attend equally to the interests of both *cestuis que trust*, and to apprise both of the intention of selling, that each might take the means to procure an advantageous sale (*s*)."

A trustee would not be justified in clogging the sale with any restrictions or conditions that were not absolutely necessary with reference to the state of the title (*t*).

There seems to be no rule to prevent trustees from selling in lots, should the auctioneer or other experienced person recommend it as the most advisable course (*u*).

It is certain that *assignees of a bankrupt* cannot buy in at the auction without the authority of the creditors. Where the assignees had put up the estate in two lots, and bought them in, and afterwards upon a re-sale there was a gain upon one lot and a loss upon the

(*s*) *Anon. case*, 6 Mad. 10.

(*u*) See *Ord v. Noel*, 5 Mad.

(*t*) See *Wilkins v. Fry*, 2 Rose, 438; and see *ex parte Lewis*, 1 Gl. 375; *S. C.* 1 Mer. 268.

& J. 69.

other, the balance upon the whole being in favour of the estate, Lord Eldon compelled the assignees to account for the diminution of price on the one lot, and would not allow them to set off the increase of price on the other (*x*). It may be thought perhaps that assignees acting under a statute may have less discretionary power than belongs to ordinary trustees; but in *Taylor v. Tabrum* (*y*) the same principle was applied to trustees in the proper sense of the word. An estate had been devised upon trust to sell, and soon after the testator's death the trustees put up the property to auction and 6000*l.* was bid, but one of the parties interested desiring it might not be sold under 7000*l.*, the property was bought in. Four or five years afterwards they sold it for 3600*l.*, and they were held responsible for the consequent loss to the estate. It was said by Sir J. Leach, that, "if the sale be made with all the circumstances of caution which a provident owner would have applied in the case of his own property, it could not be a breach of trust that the estate did not produce a full price, for, the very nature of an auction was that the adequacy of price should be submitted to the chance of competition (*z*)."

Trustees for sale under an act of parliament are chargeable with auction duty in the same manner as any other vendor (*a*).

The purchaser, after the contract, should not be let into possession of the estate until the completion of the sale by payment of the full purchase money (*b*).

(*x*) *Ex parte Lewis*, 1 Gl. & J. 69; and see *ex parte Buxton*, Id. 355. (*a*) *King v. Winstanley*, 8 Price, 180.
 (*y*) 6 Sim. 281. (*b*) *Oliver v. Court*, 8 Price, 166, *per* Chief Baron Richards.
 (*z*) *Ord v. Noel*, 5 Mad. 440.

The objection is sometimes taken that, one of the trustees having died and a new trustee not having been substituted, the survivor is incompetent to execute a valid conveyance ; but the legal estate passes to the surviving joint tenant at law (*c*), and the trust, as we have seen, shifts to the survivor in equity (*d*) : a proviso for appointment of new trustees may certainly be so framed, that the execution of the trust should, until a new trustee has been substituted, remain in suspense (*e*) ; but the clause, as usually penned in settlements, is considered by the Courts to be merely of a directory character (*f*).

In drawing the conveyance it is usual, in order to secure the trustees from the possibility of parting with any interest to which they may be entitled beneficially, to insert in the operative part of the instrument the words "according to their estate and interest as such trustees;" and the word "grant" being commonly, though erroneously, supposed to contain a warranty (*g*), the trustee, instead of "granting, bargaining, selling, and releasing," is made to "bargain, sell, and release," with the omission of the word "grant."

A trustee cannot be compelled to enter into any other covenant than against incumbrances by his own acts (*h*) ; but it was laid down by Lord Eldon, that assignees of bankrupts, who, it must be remembered, are trustees, were bound in case they could not deliver up the title-deeds to furnish the purchaser with attested copies and covenant for the production of the originals, the covenant

(*c*) *Doe v. Godwin*, 1 D. & R. 259.

(*d*) See *supra*, p. 266.

(*e*) See *Foley v. Wontner*, 2 Jac. & Walk. 246.

(*f*) See *supra*, p. 267.

(*g*) See Co. Lit. 384. a. note (1), Hargrave & Butler's Ed.

(*h*) *White v. Foljambe*, 11 Ves. 345, *per* Lord Eldon.

to be confined to the period during which the assignees should continue in office (i).

In a mortgage accompanied with a power of sale, the mortgagee, who is a *quasi* trustee, can under the power make a title to the purchaser without the concurrence of the mortgagor (k). And a clause in the mortgage deed that the mortgagor shall, if required, be a party to the conveyance, is considered a contract for the exclusive benefit of the mortgagee, and not as imposing the necessity of procuring the mortgagor's consent to the sale (l).

If the trustees have a power of signing discharges, the purchaser is exempt from seeing to the application of his purchase-money, and the *cestuis que trust* need not in that respect be made parties to the conveyance (m); but, as trustees are bound to covenant against their own incumbrances only, the *cestuis que trust*, where it is practicable, are made parties to the deed, that the purchaser may have the benefit of their covenants for title according to the extent of their respective interests.

As the trust is a joint office, the receipt for the purchase-money must be signed by all the trustees who have undertaken to act. And where a *power* is given to trustees to discharge the purchaser from seeing to the application of his purchase-money, the receipt must be signed even by a trustee who has parted with the estate by a conveyance to his co-trustees, for the transfer of the estate at law carries not along with it the confidence in equity (n). But the receipt need not be signed by a

(i) *Ex parte Stuart*, 2 Rose, 215.

(k) *Corder v. Morgan*, 18 Ves. 344; *Clay v. Sharpe*, cited id. 346, note (b).

(l) *Corder v. Morgan*, 18 Ves. 347, per Sir W. Grant.

(m) See *Binks v. Lord Rokeby*, 2 Mad. 227.

(n) *Crewe v. Dicken*, 4 Ves. 97.

trustee who has disclaimed, for by the effect of disclaimer the acting trustees are put exactly in the same plight as if the renouncing trustee had never been mentioned (*o*). It was formerly held that a trustee who with the intention of disclaiming *released* the estate to his co-trustees should be considered to have acted (*p*); but the more liberal construction of the present day appears to be, that a conveyance *bond fide* executed with the intention of disclaiming shall, in despite of the want of formality, have the force and effect of a disclaimer (*q*).

Trustees for sale and payment of debts are of course bound at any time to answer inquiries by the author of the trust, or the persons claiming under him, as to what estates have been sold and what debts have been paid (*r*).

When the affairs of the trust have been finally settled, the trustees will be entitled to the possession of the vouchers as their discharge to the *cestui que trust*; but the *cestui que trust* will have a right to the inspection of them, that he may answer demands made upon him in relation to the debts (*s*).

In what cases the receipts of trustees will in the absence of any express provision be from the nature of the trust a sufficient discharge, will be found very fully and satisfactorily considered in the able Treatise of Vendors and Purchasers (*t*).

II. We now come to the subject of purchases by the trustees of the property vested in them upon trust;

(*o*) *Adams v. Taunton*, 5 Mad. 435; *Hawkins v. Kemp*, 3 East, 410; *Smith v. Wheeler*, 1 Vent. 128.

(*p*) *Crewe v. Dicken*, *ubi supra*.

(*q*) See *supra*, p. 226.

(*r*) *Clarke v. Earl of Ormonde*, Jac. 120, *per* Lord Eldon.

(*s*) *Ib. per eundem*.

(*t*) Ch. xi. Sect. 1.

and under this head it will be proper to consider: 1, The extent and operation of the rule, that a trustee shall not purchase the trust estate; 2, The species of relief to which the *cestui que trust* will be entitled; 3, The time within which the *cestui que trust* must apply to the Court.

1. The general rule is, that a *trustee for sale*, however the case may stand with reference to another trustee (*u*), is disabled from purchasing the trust property (*x*), whether it be real estate or chattels personal (*y*), whether the purchase be made in his own name or in the name of a trustee (*z*), by private contract or public auction (*a*), from himself as the single trustee, or with the sanction of his co-trustees (*b*); for he who undertakes to act for

(*u*) See *Parkes v. White*, 11 Ves. 226; *Randall v. Errington*, 10 Ves. 426; *Ayliffe v. Murray*, 2 Atk. 59; *Davidson v. Gardner*, cited Vend. & Pur. 603, 8th Ed.

(*x*) *Fox v. Mackreth*, 2 B. C. C. 400; *S. C.* 2 Cox, 320; affirmed in D. P. 4 B. P. C. 258; &c. That *Fox v. Mackreth* was decided upon this ground, see *Gibson v. Jeyes*, 6 Ves. 277; *ex parte Lacey*, id. 627; *ex parte James*, 8 Ves. 353; *Coles v. Trecothick*, 9 Ves. 247; *ex parte Bennett*, 10 Ves. 394.

(*y*) *Crowe v. Ballard*, 2 Cox, 253; *S. C.* 3 B. C. C. 117; *Killick v. Fleazney*, 4 B. C. C. 161; *Hall v. Hallet*, 1 Cox, 134; *Whatton v. Toone*, 5 Mad. 54; 6 Mad. 153.

(*z*) *Campbell v. Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601; *Ran-*

dall v. Errington, 10 Ves. 423; *Crowe v. Ballard*, 2 Cox, 253; *S. C.* 3 B. C. C. 117; *Hall v. Hallet*, 1 Cox, 134; *Watson v. Toone*, 6 Mad. 153.

(*a*) *Campbell v. Walker*, *Randall v. Errington*, *ubi supra*; *ex parte Bennett*, 10 Ves. 381, see 393; *ex parte James*, 8 Ves. 337, see 349; *Whelpdale v. Cookson*, 1 Ves. 9; *S. C.* stated from R. L. *Campbell v. Walker*, 5 Ves. 682; *ex parte Hughes*, 6 Ves. 617; *ex parte Lacey*, id. 625; *Listerv. Lister*, id. 631; *Whichcote v. Lawrence*, 3 Ves. 740; *Attorney-General v. Lord Dudley*, Coop. 146; *Downes v. Grazebrook*, 3 Mer. 200.

(*b*) *Whichcote v. Lawrence*, 3 Ves. 740; *Hall v. Noyes*, cited id. 748; and see *Morse v. Royal*, 12 Ves. 374.

another in any matter cannot in the same matter act for himself (*c*). The situation of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui que trust's* benefit (*d*). Besides, if the trustee appeared at the auction professedly as a bidder, that would operate as a discouragement to others, who, seeing the vendor ready to purchase at or above the real value, would feel a reluctance to enter into the competition, and so the sale would be chilled (*e*).

Lord Rosslyn is said to have considered that to invalidate a purchase by a trustee it was necessary to show he had gained an actual advantage (*f*); but the doctrine, if any such was ever held by his Lordship (*g*), has since been expressly and unequivocally denied (*h*). The rule is now universal, that, however fair the transaction, the *cestui que trust* is at liberty to set aside the sale and take back the property (*i*). If a trustee were permitted to buy in an *honest* case, he might buy in a case *having that*

(*c*) *Whichcote v. Lawrence*, 3 Ves. 750, *per* Lord Rosslyn; *ex parte Lacey*, 6 Ves. 626, *per* Lord Eldon. Coop. 148; *ex parte James*, 8 Ves. 348.

(*d*) See *ex parte James*, 8 Ves. 348. (*i*) *Ex parte Lacey*, 6 Ves. 625, see 627; *Owen v. Foulkes*, cited *id.* 630, note (*b*); *ex parte Bennett*, 10 Ves. 393, *per* Lord Eldon; *Randall v. Errington*, 10 Ves. 423, see 428; *Campbell v. Walker*, 5 Ves. 678, see 680; *ex parte James*, 8 Ves. 347, 348, *per* Lord Eldon; *Lister v. Lister*, 6 Ves. 631; *Gibson v. Jeyes*, 6 Ves. 277, *per* Lord Eldon; but see *Kilbee v. Sneyd*, 2 Moll. 186.

(*e*) See *ex parte Lacey*, 6 Ves. 629. (*f*) See *Whichcote v. Lawrence*, 3 Ves. 750.

(*g*) See *ex parte Lacey*, 6 Ves. 626; *Lister v. Lister*, *id.* 632.

(*h*) *Ex parte Bennett*, 10 Ves. 385; *ex parte Lacey*, 6 Ves. 627; *Attorney-General v. Lord Dudley*,

appearance, but which, from the infirmity of human testimony, might be grossly otherwise (j). Thus, a trustee for the sale of an estate may, by the knowledge acquired by him in that character, have discovered a valuable coal-mine under it, and, locking that up in his own breast, might enter into a contract for the purchase to himself. In such a case, if the trustee chose to deny it, how could the Court establish the fact against that denial? The probability is, that a trustee who had once conceived such a purpose would never disclose it, and the *cestui que trust* would be effectually defrauded (*k*).

As a trustee cannot buy on his own account, it follows that he cannot be permitted to buy as agent for a third person: the Court can with as little effect examine how far the trustee has made an undue use of information acquired by him in the course of his duty in the one case as in the other (*l*).

And the rule against purchasing the trust property applies to an agent employed by the trustee for the purposes of the sale, as strongly as to the trustee himself (*m*).

The lease of an estate is in fact the sale of a partial interest in it, and therefore trustees for sale cannot grant a demise to one of themselves, but the lessee, while he shall be held to his bargain if disadvantageous to him,

(j) *Ex parte Bennett*, 10 Ves. 385, *per* Lord Eldon. *parte Badcock*, 1 Mont. & Mac. 239.

(k) *Ex parte Lacey*, 6 Ves. 627, *per* Lord Eldon; and see *ex parte Bennett*, 10 Ves. 385, 394, 400; *ex parte James*, 8 Ves. 348, 349; *Parkes v. White*, 11 Ves. 226; *Campbell v. Walker*, 5 Ves. 681; *Lister v. Lister*, 6 Ves. 632; *ex parte Badcock*, 1 Mont. & Mac. 239. ^o(l) *Ex parte Bennett*, 10 Ves. 381, see 400; *Coles v. Trecothick*, 9 Ves. 248, *per* Lord Eldon; and see *Gregory v. Gregory*, Coop. 204. (m) *Whitcomb v. Minchin*, 5 Mad. 91.

shall be made to account for the profits if it be in his favour (*n*).

But when it is said a trustee for sale may not purchase the trust property, the meaning must be understood to be that the trustee may not *purchase from himself*; for there is no rule that a trustee may not *purchase from his cestui que trust* (*o*). However, a purchase by the trustee from his *cestui que trust* is at all times a transaction of great nicety, and one which the Courts will watch with the utmost diligence (*p*): the exception runs, it is said, so near the verge of the rule, that it might as well be included under it (*q*).

Before any dealing with the *cestui que trust*, the relation between the trustee and *cestui que trust* must be *actually* or *virtually* dissolved. The trustee may, if he pleases, retire from the office, and qualify himself for becoming a purchaser by divesting himself of that character (*r*), or, if he retain the situation, the parties must be put so much at arm's length, that they agree to stand in the adverse situations of vendor and purchaser (*s*), the

(*n*) *Ex parte Hughes*, 6 Ves. 617; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, see 500.

(*o*) *Ex parte Lacey*, 6 Ves. 626, per Lord Eldon; *Coles v. Trecothick*, 9 Ves. 244, 246, per eundem; *Gibson v. Jeyes*, 6 Ves. 277, per eundem; *Downes v. Grazebrook*, 3 Mer. 208, per eundem; *Randall v. Errington*, 10 Ves. 426, per Sir W. Grant; *Whichcote v. Lawrence*, 3 Ves. 750, per Lord Rosalyn; *Sanderson v. Walker*, 13 Ves. 601, per Lord Eldon; *Ayliffe v. Murray*, 2 Atk. 59, per Lord Hardwicke; *Kilbee v. Sneyd*, 2

Moll. 214, per Sir A. Hart.

(*p*) *Coles v. Trecothick*, 9 Ves. 244, per Lord Eldon; *ex parte Lacey*, 6 Ves. 626, per eundem; *Downes v. Grazebrook*, 3 Mer. 209, per eundem.

(*q*) *Morse v. Royal*, 12 Ves. 372, per Lord Erskine.

(*r*) *Downes v. Grazebrook*, 3 Mer. 208, per Lord Eldon.

(*s*) *Gibson v. Jeyes*, 6 Ves. 277, per Lord Eldon; and see *ex parte Lacey*, 6 Ves. 626, 627; *ex parte Bennett*, 10 Ves. 394; *Morse v. Royal*, 12 Ves. 373; *Sanderson v. Walker*, 13 Ves. 601.

cestui que trust distinctly and fully understanding that he is selling to the trustee, and consenting to waive all objections upon that ground (*t*), and the trustee fairly and honestly disclosing all the necessary particulars of the estate, and not attempting a furtive advantage to himself by means of any private information (*u*): the trustee will not be allowed to go on acquainting himself with the nature of the property up to the moment of sale, and then, casting aside his character of trustee, turn his experience to his own account (*x*).

In what cases a trustee will be at liberty to become a purchaser may be best illustrated by a few instances.

Where the *cestui que trust* took the whole management of the sale himself, chose, or at least approved the auctioneer, made surveys, settled the plan of sale, fixed the price, and so had a perfect knowledge of the value of the property, and then by his agent, but with his own personal consent, agreed to sell a lot which had been bought in to one of the trustees acting as agent for another, Lord Eldon said, that if in any instance the rule was to be relaxed by consent of the parties, this was the case, and decreed the agreement to be specifically performed (*y*).

A *cestui que trust* had urged the purchase upon the trustee, who at first expressed an unwillingness, but afterwards agreed to the terms; and the sale was supported (*z*).

(*t*) See *Randall v. Errington*, 10 Ves. 427, per Sir W. Grant.

(*u*) *Coles v. Trecothick*, 9 Ves. 247, per Lord Eldon; *Morse v. Royal*, 12 Ves. 373, 377, per Lord Erskine; *Gibson v. Jeyes*, 6 Ves. 277, per Lord Eldon; *Randall v.*

(*x*) See *ex parte James*, 8 Ves. 352.

(*y*) *Coles v. Trecothick*, 9 Ves. 234.

(*z*) *Morse v. Royal*, 12 Ves. 355.

So, where the trustee had endeavoured in vain to dispose of the estate, and then purchased himself of the *cestui que trust* at a fair and adequate price, and there was no imputation of fraud or concealment, Lord Northington said, "He did not *like* the circumstance of a trustee dealing with his *cestui que trust*, but, upon the whole, he did not see any principle upon which he could set the transaction aside (a)."

It has been pronounced too dangerous to allow the *cestui que trust's* solicitor, without a *special* authority, to bind his employer by such a contract with the trustee (b).

Where the *cestuis que trust* are creditors, the trustee cannot purchase with the sanction of the major part of them, but the liberty must be given by the unanimous voice of the whole body (c).

The Court has no jurisdiction to authorize a trustee to bid, for that is a question the *cestuis que trust* ought to decide for themselves (d).

If the *cestuis que trust* be under disability, as infants, the trustee, as he cannot be released from the liabilities of his situation, cannot by any act *in pais* become the purchaser of the estate (e); but, if it be absolutely necessary that the property should be sold, and the trustee is ready to give more than any one else, he may file a bill in Chancery, and apply by motion to be allowed to pur-

(a) *Clarke v. Swaile*, 2 Ed. 134.

(b) *Downes v. Grazebrook*, 3 Mer. 209, *per* Lord Eldon.

(c) See *Sir G. Colebrooke's case*, cited *ex parte Hughes*, 6 Ves. 622; *ex parte Lacey*, *id.* 628; the cases cited *id.* 630, note (b). *Whelpdale v. Cookson*, cited *Campbell v.*

Walker, 5 Ves. 682, must be considered as overruled.

(d) See *ex parte James*, 8 Ves. 352; and see *Anon. case*, 2 Russ. 350; *ex parte Bage*, 4 Mad. 459.

(e) *Campbell v. Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601.

chase, and the Court will then examine into the circumstances, ask who had the conduct of the transaction, whether there is reason to suppose the premises could be sold better, and upon the result of that inquiry will let another person prepare the particular of sale, and allow the trustee to bid (*f*).

The principles laid down with reference to trustees for sale are of course applicable to all who, though differing in name, are invested with the like fiduciary character, as executors and administrators (*g*), assignees of bankrupts (*h*), & c.; but a creditor taking out execution is not precluded from becoming the purchaser of the property upon a sale by the sheriff (*i*).

2. Next as to the *terms* upon which the sale will be set aside.

The *cestui que trust*, if he choose it, may have the specific estate reconveyed to him by the trustee (*j*), or, where the trustee has sold it with notice, by the party who purchased (*k*), the *cestui que trust* on the one hand repaying the price at which the trustee bought with interest at 4 per cent. (*l*), and the trustee or pur-

(*f*) *Campbell v. Walker*, 5 Ves. 681, 682, *per* Lord Alvanley.

(*g*) *Hall v. Hallet*, 1 Cox, 134; *Killick v. Flexney*, 4 B. C. C. 161; *Watson v. Toone*, 6 Mad. 153; *Kilbee v. Sneyd*, 2 Moll. 186.

(*h*) *Ex parte Hughes*, 6 Ves. 617; *ex parte Lacey*, *id.* 625, and the cases cited *id.* 630, note (*b*); *ex parte Bennett*, 10 Ves. 395, *per* Lord Eldon; *ex parte Reynolds*, 5 Ves. 707; *ex parte James*, 8 Ves. 346, *per* Lord Eldon; *ex parte Morgan*, 12 Ves. 6; *ex parte Bage*,

4 Mad. 459; *ex parte Badcock*, 1 Mont. & Mac. 231.

(*i*) *Stratford v. Twynam*, Jac. 418.

(*j*) See *ex parte James*, 8 Ves. 351; *ex parte Bennett*, 10 Ves. 400; *Lord Hardwicke v. Vernon*, 4 Ves. 411; *York Buildings Company v. Mackenzie*, 8 B. P. C. 42.

(*k*) *Attorney-General v. Lord Dudley*, Coop. 146; *Dunbar v. Tredennick*, 2 B. & B. 304.

(*l*) *Watson v. Toone*, 6 Mad. 153; *ex parte James*, 8 Ves. 351.

chaser on the other accounting for the profits of the estate (*m*), and, if he was in actual possession, submitting to be charged with an occupation rent (*n*).

The trustee will have all just allowances made to him for improvements and repairs that are substantial and lasting (*o*), or such as have a tendency to bring the estate to a better sale (*p*), as in one case for a mansion house erected, plantations of shrubs, &c. (*q*); and in estimating the improvements the buildings pulled down, if they were incapable of repair, will be valued as old materials, but otherwise as buildings standing (*r*): should the property have been *deteriorated* by the acts of the trustee, his purchase money will suffer a proportionate reduction (*s*).

But, it seems, where the contract was vitiated by the presence of actual fraud, allowance will be made to the trustee for necessary repairs (*t*), but not for improvements. "If," said Lord Fitzgibbon, "the person really entitled to the estate will encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such an expenditure without apprising the

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| <i>per</i> Lord Eldon; <i>Whelpdale v. Cookson</i> , stated from <i>R. L. Campbell v. Walker</i> , 5 Ves. 682; <i>Hall v. Hallet</i> , 1 Cox, 184, see 139; <i>York Buildings Company v. Mackensie</i> , <i>ubi supra</i> ; &c. | (<i>o</i>) <i>Ex parte Hughes</i> , 6 Ves. 624, 625; <i>ex parte James</i> , 8 Ves. 352; <i>Campbell v. Walker</i> , 5 Ves. 682. |
| (<i>m</i>) <i>Ex parte James</i> , 8 Ves. 351, <i>per</i> Lord Eldon; <i>ex parte Lacey</i> , 6 Ves. 630, <i>per eundem</i> ; <i>Watson v. Toone</i> , 6 Mad. 153; <i>Whelpdale v. Cookson</i> , <i>York Buildings Company v. Mackensie</i> , <i>ubi supra</i> . | (<i>p</i>) <i>Ex parte Bennett</i> , 10 Ves. 400. |
| (<i>n</i>) <i>Ex parte James</i> , 8 Ves. 351, <i>per</i> Lord Eldon. | (<i>q</i>) <i>York Buildings Company v. Mackensie</i> , <i>ubi supra</i> . |
| | (<i>r</i>) <i>Robinson v. Ridley</i> , 6 Mad. 2. |
| | (<i>s</i>) <i>Ex parte Bennett</i> , 10 Ves. 401. |
| | (<i>t</i>) <i>Baugh v. Price</i> , 1 Wils. 320. |

party of his intention to dispute his title, and will afterwards endeavour to avail himself of such fraud, the jurisdiction of a Court of Equity will clearly attach upon the case. But does it follow from thence, that, if a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, that therefore he shall retain it in his hands against the lawful proprietor? If such a rule should prevail, it would justify a proposition I once heard at the bar, that the common equity of the country was to improve the right owner out of the possession of his estate (*u*)."

A trustee, the sale having taken place during the pendency of a suit, had paid part of his purchase money into Court, which had been invested in the funds. On the purchase being set aside, the trustee claimed the benefit of the rise of the stock, but it was held he was only entitled to his purchase money with interest; for had there occurred a fall of the stock, he could not have been compelled to submit to the loss (*x*).

If the trustee is to be discharged from the situation of purchaser, he is to be discharged at once, and the Court will order an immediate conveyance upon immediate payment of the money (*y*).

The re-conveyance of the estate will be without prejudice to the titles and interests of lessees and others who have contracted with the trustee *bond fide* before the pendency of the suit (*z*).

But the bill of the *cestui que trust*, particularly where

(*u*) *Kenney v. Browne*, 3 Ridg. 518; but see *Oliver v. Court*, 8 Price, 172.

(*x*) *Ex parte James*, 8 Ves. 337, see 351.

(*y*) See *ex parte Bennett*, 10 Ves. 400, 401.

(*z*) *York Buildings Company v. Mackenzie*, 8 B. P. C. 42, see the decree.

the assignee of a bankrupt was the purchaser, prays not a re-conveyance of the specific estate, but a re-sale of the property under the direction of the Court. The terms of the re-sale have not always been uniform. In *Whelpdale v. Cookson* (a) Lord Hardwicke said, the majority of the creditors should *elect* whether the purchase should stand; so that should they have elected to re-sell, and the estate had been sold at a still lower price, the creditors would have suffered. The doctrine of Lord Thurlow appears to have been that the property should be put up at the price at which the trustee purchased, and if any advance was made, the sale should take effect, but if no bidding, the trustee should be held to his bargain (b). Lord Alvanley followed the authority of Lord Hardwicke, for in the case of infant *cestuis que trust* he directed an inquiry by the master, whether it was for the benefit of the infants that the premises should be re-sold, and, if for their benefit, the sale should be made (c). "To this principle," said Lord Eldon, "the objection is, that a great temptation to purchase is offered to trustees, the question whether the re-sale would be advantageous to the *cestui que trust* being of necessity determined at the hazard of a wrong determination (d)." Lord Eldon therefore conceived it best to adopt the rule of Lord Thurlow, and so he decreed in *ex parte Hughes* (e) and *ex parte Lacey* (f). Sir W. Grant in a subsequent case (g) said he was not aware that Lord Eldon had

(a) Cited *Campbell v. Walker*,
5 Ves. 682.

(b) See *Lister v. Lister*, 6 Ves.
633; *ex parte James*, 8 Ves. 351.

(c) *Campbell v. Walker*, 5 Ves.
678, see 682.

(d) *S. C.* 13 Ves. 603.

(e) 6 Ves. 617.

(f) *Id.* 625; and see *ex parte*
Reynolds, 5 Ves. 707.

(g) *Lister v. Lister*, 6 Ves.
633.

laid down any general rule as to the terms; but a few days after, having consulted the Lord Chancellor upon the subject and discovering his mistake, he framed his decree in conformity with the Lord Chancellor's decisions. The same principle has since been followed in numerous other cases (*h*), and the practice may be considered as settled.

Should the trustees have repaired or improved the estate, the expense of the repairs and improvements would be added to the purchase-money, and the estate be put up at the accumulated sum (*i*).

Where the trustee has purchased in one lot, the *cestuis que trust* cannot insist on a re-sale in different lots. If desirous of re-selling the property in that mode, they must pay the trustee his principal and interest, and then, as the absolute owners, they may sell as they please (*k*).

In the application of Lord Hardwicke's rule it was a question constantly occurring, whether the body of creditors at large could be bound by the resolution of the majority to insist upon a re-sale; but by the practice of Lord Eldon the difficulty on that head is avoided (*l*), for as the creditors cannot by possibility sustain an injury, it is competent to any individual creditor to try the experiment (*m*).

If before the *cestui que trust* files his bill for relief the trustee has passed the estate into the hands of a pur-

(*h*) *Ex parte James*, 8 Ves. 337; 351, 352.
ex parte Bennett, 10 Ves. 381; (*l*) *Ex parte Hughes*, 6 Ves.
Robinson v. Ridley, 6 Mad. 2. 624.
(*i*) *Ex parte Bennett*, 10 Ves. 400; *ex parte Hughes*, 6 Ves. 625; *Robinson v. Ridley*, 6 Mad. 2.
(*m*) *Ex parte James*, 8 Ves. 353; and see *ex parte Lacey*, 6 Ves. 628.
(*k*) See *ex parte James*, 8 Ves.

chaser, and the purchaser had notice of the equity, the same remedies may be prosecuted against the purchaser as against the trustee (*n*); but if the sale was without notice, the *cestui que trust* may then compel the trustee to account for the difference of price (*o*), or for the difference between the sum the trustee paid and the real value of the estate at the time of the purchase (*p*), with interest at four per cent. (*q*).

The trustee of some shares in Scotch mines became the purchaser himself, and afterwards sold them to a stranger at a considerable advance of price. Lord Thurlow decreed the trustee to account for every advantage he had made, but said he could not go the length of ordering the specific shares to be replaced. He conceived the *cestui que trust* had no such election of choosing between the specific thing and the advantage made of it (*r*).

The costs of the suit will, as a general rule, follow the decree—that is, if the trustee be compelled to give up his purchase, he must pay the expenses occasioned by his own misbehaviour (*s*): and if the charge be unfounded, the costs must be paid by the plaintiff. But if there be great delay on the part of the *cestui que trust*, the costs will be refused him, though he succeed in the suit (*t*);

(*n*) *Attorney-General v. Lord* see 139.

Dudley, Coop. 146; *Dunbar v.* (*r*) *S. C.*

Tredennick, 2 B. & B. 304.

(*s*) *Whichcote v. Lawrence*, 3

(*o*) *Fox v. Mackreth*, 2 B. C. C. Ves. 752; *Hall v. Hallet*, 1 Cox,

400; *S. C.* 2 Cox, 320; *Hall v.* 141; *Sanderson v. Walker*, 13

Hallet, 1 Cox, 134; *Whichcote v.* Ves. 601, 604; *Crowe v. Ballard*,

Lawrence, 3 Ves. 740; *ex parte* 2 Cox, 253; *S. C.* 3 B. C. C. 117;

Reynolds, 5 Ves. 707; *Randall v.* *Dunbar v. Tredennick*, 2 B. & B.

Errington, 10 Ves. 423. 304.

(*p*) See *Lord Hardwicke v. Vernon*, 4 Ves. 411.

(*t*) *Attorney-General v. Lord Dudley, Coop.* 146.

(*q*) *Hall v. Hallet*, 1 Cox, 134,

and, on the other hand, if the bill be dismissed not because the transaction was not originally impeachable but merely on account of the great interval of time, the court may refuse to order the costs of the defendant (*u*).

3. If the *cestui que trust* desire to set aside the purchase, he must make his application to the Court in *reasonable time*, or he will not be entitled to relief (*x*). A long acquiescence under a sale to a trustee is treated as evidence that the relation between the trustee and *cestui que trust* had been previously abandoned, and that in all other respects the purchase was fairly conducted (*y*).

A sale cannot be set aside after a lapse of twenty years (*z*); but in these cases the Court does not confine itself to that period by analogy to the statute of limitations, for relief has been refused after an acquiescence of eighteen years (*a*); and it is presumed even a shorter period would be a bar to the remedy, where the *cestui que trust* could offer no excuse for his *laches* (*b*). However, the sale has been opened after an interval of ten years (*c*).

Persons not *sui juris*, as *feme coverts* and infants, cannot be precluded from relief on the ground of

(*u*) *Gregory v. Gregory*, Coop. 226, per Lord Eldon; and see 201. *Morse v. Royal*, 12 Ves. 374,

(*x*) *Campbell v. Walker*, 5 Ves. 378.

680, 682, per Lord Alvanley; (*z*) *Price v. Byrn*, cited *Campbell v. Walker*, 5 Ves. 681.

59, per Sir T. Plumer; *ex parte* (*a*) *Gregory v. Gregory*, Coop. 201.

James, 8 Ves. 351, per Lord Eldon; (*b*) See *Oliver v. Court*, 8 Price, 167, 168.

Webb v. Rorke, 2 Sch. & Lef. 672, per Lord Redesdale; *Randall v. Errington*, 10 Ves. 427, (*c*) *Hall v. Noyes*, cited *Whichcote v. Lawrence*, 3 Ves. 748.

per Sir W. Grant.

(*y*) *Parkes v. White*, 11 Ves.

acquiescence during the continuance of the disability (*d*).

And a *class* of persons, as creditors, cannot be expected in the prosecution of their common interest to exert the same vigour and activity, as *individuals* would do in the pursuit of their exclusive rights (*e*). Accordingly creditors have succeeded in their suit after a *laches* of twelve years (*f*); and a sect of dissenters was once allowed to impeach a sale after a lapse of more than twenty years (*g*); but even creditors will be barred of their remedy if they be chargeable with very gross *laches*, as with acquiescence in the sale for a period of thirty-three years (*h*).

For *laches* to operate as a bar, it must be shewn that the *cestui que trust* knew the trustee was the purchaser; for while the *cestui que trust* continues ignorant of that fact, he cannot be blamed for not having quarrelled with the sale (*i*).

The length of time may also be satisfactorily accounted for, without the imputation of negligence, by the *distress* of the *cestui que trust* (*k*).

Of course the *cestui que trust* may ratify the sale to

(*d*) *Campbell v. Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601; *Roche v. O'Brien*, 1 B. & B. 330, see 339.

(*e*) *Whichcote v. Lawrence*, 3 Ves. 740, see 752; *Hardwick v. Mynd*, 1 Anst. 109; and see *Kidney v. Coussmaker*, 12 Ves. 158; *York Buildings' Company v. Mackenzie*, 8 B. P. C. 42.

(*f*) *Anon. case* in the Exchequer, cited *Lister v. Lister*, 6 Ves. 632.

(*g*) *Attorney-General v. Lord Dudley*, Coop. 146.

(*h*) See *Hercy v. Dinwoody*, 2 Ves. jun. 87.

(*i*) *Randall v. Errington*, 10 Ves. 423, see 427; *Chalmer v. Bradley*, 1 J. & W. 51.

(*k*) *Oliver v. Court*, 8 Price, 127, see 167, 168; and see *Gregory v. Gregory*, Coop. 201; *Roche v. O'Brien*, 1 B. & B. 342.

the trustee by an express and actual confirmation (*l*); and if the *cestui que trust* choose to confirm it, he cannot afterwards annul his own act on the ground of want of adequate consideration (*m*). But,

1. The confirming party must be *sui juris*—not labouring under any disability, as infancy or coverture (*n*).

2. The confirmation must be a solemn and deliberate act, not, for instance, fished out from loose expressions in a letter (*o*); and particularly where the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the Court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence (*p*).

3. There must be no *suppressio veri* or *suggestio falsi*, but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case (*q*).

4. The confirming party must not be ignorant of the law, that is, he must be aware that the transaction is of such a character, that he could impeach it in a court of equity (*r*).

(*l*) *Morse v. Royal*, 12 Ves. 355; *Clarke v. Swaile*, 2 Ed. 134; and see *Chesterfield v. Janssen*, 2 Ves. 125; *S. C.* 1 Atk. 301.

(*m*) *Roche v. O'Brien*, 1 B. & B. 353, *per* Lord Manners.

(*n*) *Campbell v. Walker*, 5 Ves. 678; *S. C.* 13 Ves. 601; *Roche v. O'Brien*, 1 B. & B. 330, *see* 339.

(*o*) *Carpenter v. Heriot*, 1 Ed. 338.

(*p*) *Morse v. Royal*, 12 Ves. 373, *per* Lord Erskine.

(*q*) See *Murray v. Palmer*, 2 Sch. & Lef. 486; *Baugh v. Price*, 1 Wils. 320; *Morse v. Royal*, 12 Ves. 373; *Cole v. Gibson*, 1 Ves. 507; *Roche v. O'Brien*, 1 B. & B. 338, and following pages; *Adams v. Clifton*, 1 Russ. 297; *Cockerell v. Cholmley*, 1 Russ. & M. 425; *S. C.* Taml. 444; *Chesterfield v. Janssen*, 2 Ves. 146, 149, 152, 158; *Chalmer v. Bradley*, 1 J. & W. 51.

(*r*) See *Cann v. Cann*, 1 P. W. 727; *Dunbar v. Tredennick*, 2 B.

5. The confirmation must be wholly distinct from and independent of the original contract (*s*)—not a conveyance of the estate executed in pursuance of a covenant in the original deed for further assurance (*t*).

6. The confirmation must not be wrung from the *cestui que trust* by distress or terror (*u*).

7. Where the *cestuis que trust* are a class of persons, as creditors, the sanction of the major part will not be obligatory on the rest ; but the confirmation, to be complete, must be the joint act of the whole body (*x*).

& B. 317; *Crowe v. Ballard*, 2 Cox, 257; *S. C.* 1 Ves. jun. 220; *S. C.* 3 B. C. C. 120; *Baugh v. Price*, *Cockerell v. Cholmley*, *Chesterfield v. Janssen*, *Chalmer v. Bradley*, *Murray v. Palmer*, *Roche v. O'Brien*, *ubi supra*.

(*s*) See *Wood v. Downes*, 18 Ves. 128; *Morse v. Royal*, 12 Ves. 373.

(*t*) *Roche v. O'Brien*, 1 B. & B. 330, see 338; *Wood v. Downes*, 18 Ves. 120, see 123; and see

Fox v. Mackreth, 2 B. C. C. 400.

(*u*) See *Roche v. O'Brien*, 1 B. & B. 330; *Dunbar v. Tredennick*, *Crowe v. Ballard*, *Chesterfield v. Janssen*, *ubi supra*.

(*x*) *Sir G. Colebrooke's case*, cited *ex parte Hughes*, 6 Ves. 622; *ex parte Lacey*, Id. 628; the cases cited, Id. 630, note (*b*). *Whelpdale v. Cookson*, cited *Campbell v. Walker*, 5 Ves. 682, must be considered as overruled.

CHAPTER XX.

THE DUTIES OF TRUSTEES OF CHARITIES.

CHARITIES are either under the management of *individual trustees*, or are established by charter as *eleemosynary corporations*.

Before entering upon the duties of trustees of charities, it may be proper to introduce a few preliminary remarks upon the subject of the Court's jurisdiction over charities established by charter.

On the institution of such a charity a *visitatorial* jurisdiction arises of common right to the founder and his heirs, whether the king or a private person; or to those whom the founder has substituted in the place of himself and his heirs (*a*); and the office of visitor is to hear and determine all differences of the members of the society amongst themselves, and generally to superintend the internal government of the body (*b*). The visitor must take as his guide the statutes originally propounded by the founder (*c*); but so long as he

(*a*) *Eden v. Foster*, 2 P. W. 1 Keene, 126.
 326, resolved. (*c*) *Green v. Rutherford*, 1 Ves.
 (*b*) See *Philips v. Bury*, Skin. 469, per Sir J. Strange; Id. 472,
 478; *Attorney-General v. Crook*, per Lord Hardwicke.

does not exceed his proper province, his decision is final, and cannot be questioned by way of appeal (*d*).

With this visitatorial power the Court of Chancery has nothing to do : it is only as respects the administration of the corporate *property* that equity assumes to itself any right of interference. "If," said Lord Commissioner Eyre, "the governors established for the regulation of a charity are not those intrusted with the management of the revenue, the Court has no jurisdiction : let the charity be ever so much abused, as far as respects this Court the abuse is without a remedy ; but if those established as governors have also the management of the revenue, the Court does assume a jurisdiction of necessity so far as they are to be considered as trustees of that revenue (*e*)."

"There are two sorts of authorities," said Lord Hardwicke, "one as to the management of the estate and revenue, the other as to the management and government of the house. In the latter the governors are absolute and not controllable by the Court of Chancery ; but so far as relates to the estates of the charity, they are subject and accountable to this Court (*f*)."

As was observed on an-

(*d*) *St. John's College, Cambridge, v. Todington*, 1 Burr. 200, per Lord Mansfield; *Attorney-General v. Lock*, 3 Atk. 165, per Lord Hardwicke ; 3 Salk. 380 ; *Attorney-General v. The Master of Catherine Hall, Cambridge*, Jac. 392, per Lord Eldon.

(*e*) *Attorney-General v. The Governors of the Foundling Hospital*, 2 Ves. jun. 47.

(*f*) *Attorney-General v. Lock*,

3 Atk. 165 ; and see upon this subject *ex parte Berkhamstead Free School*, 2 V. & B. 138 ; *The Poor of Chelmsford v. Mildmay, Duke*, 83 ; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499 ; *Eden v. Foster*, 2 P. W. 326 ; *Attorney-General v. Dixie*, 13 Ves. 533, 539 ; *Attorney-General v. Corporation of Bedford*, 2 Ves. 505.

other occasion, "that *any* person intrusted with the receipt of rents and profits should, however much he might misemploy them, be unanswerable for his receipts, would be such a privilege as might of itself be a temptation to the commission of a breach of trust (g)."

Upon the ground of this distinction between the visitatorial power and the management of the revenue, an information for the removal of governors or other corporators as having been irregularly appointed, would be dismissed with costs (h); but wherever the administration of the property by the governors can be shewn to have a tendency to pervert the end of the institution, the Court will immediately interpose, and put a stop to such wrongful application (i).

An estate newly bestowed upon an old corporation is not to be regarded in the same light as property with which the charity was originally endowed. The visitatorial power is *forum domesticum*—the private jurisdiction of the founder, and the new gift will not be made subject to it, unless the will of the donor be either actually expressed to that effect, or is to be collected by

(g) *Eden v. Foster*, 2 P. W. 326, *per cur.*

(h) *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, see 498; *Attorney-General v. Dixie*, 13 Ves. 519; *Attorney-General v. Middleton*, 2 Ves. 327, see 330; *Attorney-General v. Corporation of Bedford*, Id. 505; in *re Bedford Charity*, 5 Sim. 578; and see *ex parte Berkhamstead School*, 2 V. & B. 137, 138, 144; but see *Attorney-General v. Gaunt*, 3 Sw. 148.

(i) See *Attorney-General v. The Governors of the Foundling Hospital*, 2 Ves. jun. 48; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499. But note, Chief Baron Richards once observed, he had been of counsel in the *Foundling Hospital case*, and he remembered some of the first men of the bar were not satisfied with the decision. In *re Chertsey Market*, 6 Price, 272.

necessary implication (*k*). If a legal or equitable interest be given to a body corporate, and no special purpose be declared, the donor has plainly implied that the estate shall be under the general statutes and rules of the society, and be regulated in the same manner as the rest of their property (*l*); but if a particular and special trust be annexed to the gift, *that* excludes the visitatorial power of the original founder, and the Court, viewing the corporation in the light of an ordinary trustee, will determine all the same questions relating to such property, as would have fallen under its jurisdiction had the administration of the fund been intrusted to the hands of individuals.

Thus in *Green v. Rutherford* (*m*) an advowson was devised to St. John's College, Cambridge, upon trust, when the church should become void, to present "the senior divine then fellow of the college." A dispute arose as to the true interpretation of the words; and had the direction been contained in the statutes of the College, the construction would have fallen under the visitatorial province; but as the property was a new donation, it was held the question was determinable in the *forum* of the Court of Chancery. "A private person," it was said, "would have been compellable to execute the will, and, considered as a trust, it made no difference who were the trustees. Though here they were a collegiate body whose founder had given a visitor to superintend *his own bounty*, yet, as regarded one claiming under a *separate benefactor*, the Court would look on them as trustees, and would compel them to

(*k*) *Green v. Rutherford*, 1 Ves.
472, *per* Lord Hardwicke.

(*l*) Id. 473, *per eundem*.
(*m*) 1 Ves. 462.

execute the intent under the direction of the Court (*n*). The visitor, whose judgment must be founded on the statutes, could not execute the trusts of the will, for that would be departing from the statutes; and the adhering to the statutes would be adding further circumstances to the trust than the testator prescribed, and making it the founder's will, and not the testator's (*o*)."

But even the *visitatorial* power may, under particular circumstances and in a special manner, be exercised by the Lord Chancellor; for if the heir of the founder cannot be discovered (*p*), or become lunatic (*q*), the visitatorial power, rather than the corporation should not be visited at all, will result to the Crown. In *civil* corporations the King is visitor through the Court of King's Bench; for corporate bodies which respect the public police of the country and the administration of justice, are necessarily better regulated under the superintendence of a court of law: but as regards *eleemosynary* corporations the King's visitatorial power has been committed to the Lord Chancellor, as, in matters of charity, the more appropriate supervisor (*r*). And the mode of application to the Lord Chancellor in these cases is not by way of information, but by petition to the Great Seal (*s*).

With these prefatory remarks we proceed to the consideration of the *duties* of trustees of charities.

(*n*) 1 Ves. 468, 473.

(*o*) Id. 469.

(*p*) *Ex parte Wrangham*, 2 Ves. jun. 609; *Attorney-General v. Earl of Clarendon*, 17 Ves. 498, per Sir W. Grant; *Attorney-General v. Black*, 11 Ves. 191; *Case of Queen's College, Cambridge*, Jac. 1.

(*q*) *Attorney-General v. Dixie*, 13 Ves. 519, see 533.

(*r*) *King v. St. Catherine's Hall*, 4 T. R. 233, see 244; and see *ex parte Wrangham*, 2 Ves. jun. 619.

(*s*) See the cases cited in notes (*p*) and (*q*).

It is of course imposed upon the trustee, whether an individual or a corporation, not to convert the charity fund to other uses than according to the intent of the founder or donor; as if the gift be to find a preacher in Dale, and the trustees provide one in Sale; or if it be to find a preacher, and the trustees apply it to the poor or to some other purpose (*t*); or if the trust be to repair a chapel, and the rents be mixed up with the poor-rate for parochial purposes (*u*).

A chapel was granted to the trustees of a school for the use and benefit of the said school, and though the inhabitants of the hamlet had been long accustomed to attend divine service in the chapel, it was held that, as the chapel was for the exclusive benefit of the school, the trustees had no power to apply the revenues of the charity towards enlarging the chapel for the better accommodation of the inhabitants (*x*).

The trustees for maintaining a chapel had pulled down the edifice, converted the burial-ground to profane purposes, carried the bell to the market-place, put the pews in the parish church, and employed the stones of the chapel for repairing a bridge. Sir T. Plumer said, "it was an enormous breach of trust, and such as could not have been expected in a Christian country;" and directed an inquiry what emoluments had come to the hands of the trustees on account of the breach of trust, and what would be the expense of restoring the chapel to the state in which it stood at the time of its destruction (*y*).

(*t*) Duke, 116; and see *Wiveles-* of *Manafeld*, 2 Russ. 501.
com case, Id. 94.

(*u*) *Attorney-General v. Vivian*, Mad. 92; reversed on technical
1 Russ. 226, see 237. ground, 1 Bl. N. R. 17.

(*x*) *Attorney-General v. Earl*

A fund in aid and relief of "poor citizens who often were grievously burthened by the imposts and taxes of the city," was held not to be applicable to the payment of rates and other expenses of the city that would otherwise have been raised by public levies and impositions, nor was distributable to such of the poor as received parish relief; for that would be so much in aid of the rate-payers, but ought to have been administered for the exclusive benefit of the poor, and should therefore have been confined to such of the poor as were not supported by the parish (x).

If land or money be given for maintaining "the worship of God," and nothing more be said, the Court will execute the trust in favour of the established religion. But if it be clearly expressed upon the deed or will that the purpose of the settlor is to promote the maintenance of dissenting doctrines, the Court, provided such doctrines be not contrary to law, will execute the intention (a).

Where an institution exists for the purpose of religious worship, and it cannot be discovered from the instrument declaring the trust what form or species of religious worship was in the intention of the settlors, the Court will then inquire what has been the usage of the congregation; and if such usage do not contravene public policy, will be guided by it in the administration of the trust. But if the purpose of the settlors appear clearly upon the instrument, the Court, in that case, though the usage

(x) *Attorney-General v. Corporation of Exeter*, 2 Russ. 45; *S. C.* 3 Russ. 395. Lord Eldon's reasoning in favour of the poor gene-

rally (2 Russ. 51—54,) is extremely strong: *id. qu.*

(a) *Attorney-General v. Pearson*, 3 Mer. 409, *per* Lord Eldon.

of the congregation may have run in a different channel, cannot change the nature of the original institution: it is not competent for the majority of the congregation, or for the managers of the property to say, "We have altered our opinions: the chapel in future shall be for the benefit of persons of the same persuasion as ourselves (*b*)."

If the deed of endowment neither provide for the succession of trustees nor the election of the minister, an inquiry will be directed by the master, who, according to the nature of the establishment, are entitled to propose trustees, and to elect the minister (*c*), and if the election of the minister properly belong to the congregation, the majority is for that purpose the congregation (*d*). The appointment of the minister cannot appertain to the heir of the surviving trustee, who may not be of the same persuasion, but, it might happen, a Roman Catholic or Jew (*e*).

If a minister be in possession of the meeting-house, and preaching the doctrines that were intended by the founders, it is the practice of the Court to continue him until the case can be heard, whether he was duly elected or not (for the first point is to have the service performed), and the Court will pay him his salary (*f*).

It is the policy of the Established Church by giving the minister an estate for life in his office to render him in some degree independent of the congregation, but if it be the general usage amongst any particular class of

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| (<i>b</i>) <i>S. C.</i> Id. 400, <i>per eundem</i> ; | (<i>d</i>) <i>Davis v. Jenkins</i> , 3 V. & B. |
| <i>Foley v. Wontner</i> , 2 Jac. & Walk. | 155; and see <i>Leslie v. Birnie</i> , <i>ubi</i> |
| 247, <i>per eundem</i> ; <i>Craigdallie v.</i> | <i>supra</i> . |
| <i>Aikman</i> , 1 Dow's P. C. 1. | (<i>e</i>) <i>Davis v. Jenkins</i> , 3 V. & B. |
| (<i>c</i>) <i>Davis v. Jenkins</i> , 3 V. & B. | 154. |
| 151, see 159; and see <i>Leslie v.</i> | (<i>f</i>) <i>Foley v. Wontner</i> , 2 Jac. & |
| <i>Birnie</i> , 2 Russ. 114. | Walk. 247, <i>per Lord Eldon</i> . |

dissenters to appoint their ministers for limited periods, or to make them removable at pleasure, though a Court of Equity might not struggle hard in support of such a plan, there is no principle upon which the Court would not be bound to give it effect (*g*).

To every corporation there belongs of common right the power of establishing *by-laws* for the government of their own body, but this privilege cannot authorize the enactment of any rules or regulations that would tend to pervert or destroy the directions of the original founder and the objects of the charity (*h*). And so a clause in a deed investing the trustees, or the major part of them, with the power of making orders from time to time upon matters relating to a meeting-house would not enable them to convert the meeting-house, whenever they thought proper, into a meeting-house of a different description, and for teaching different doctrines from those of the persons who founded it, and by whom it was to be attended (*i*).

The Court itself, in the opinion of Lord Eldon (*k*) and Sir T. Plumer (*l*), cannot authorize an aberration from the original intent, except where by a literal adherence to the testator's plan his general object would be defeated, as if the wish of the founder were to establish a free grammar school, the Chancellor, though he felt perfectly convinced that a free grammar school, that is a school for

(*g*) *Attorney-General v. Pearson*, 3 Mer. 402, 403, *per* Lord Eldon.

(*h*) *Eden v. Foster*, 2 P. W. 327, resolved.

(*i*) *Attorney-General v. Pearson*, 3 Mer. 411, *per* Lord Eldon.

(*k*) *Attorney-General v. Whiteley*, 11 Vés. 241; *Attorney-General v. Earl of Mansfield*, 2 R. R.

501.

(*l*) *Attorney-General v. Dean of Christchurch*, Jac. 474.

teaching the learned languages, could be of little or no use, would yet be bound to apply the revenue as the donor had directed, and could not substitute a school for teaching English and writing and arithmetic. "The duty of the Court," said Lord Eldon, "is to enforce the trusts as they stand: the founder was the judge how far his institution was likely to be useful to the public (*m*)."

But Lord Lyndhurst (*n*), and Sir John Leach (*o*), have since held that the Court had jurisdiction to extend the application of the charity fund to purposes beyond the *strict* intention, provided such purposes were closely connected with the intention; that writing and arithmetic, for instance, might be well introduced into a scheme for the establishment or better regulation of a free grammar school.

It is clear that the charity funds cannot be diverted into a *totally different* channel without the authority of an act of Parliament; and before applying to the legislature the trustees must be careful to procure the sanction of the Court of Chancery; for if they take such a step upon the mere suggestion of their own minds, and fail in obtaining the contemplated act, they will not be allowed the costs and expenses incurred in the proceeding (*p*); but if the application to Parliament be attended with success, the trustees will then be allowed their costs though the sanction of the Lord Chancellor was not previously obtained, for the Court cannot with propriety

(*m*) *Attorney-General v. Earl of Mansfield*, 2 Russ. 521. 2 M. & K. 342; *Attorney-General v. Gascoigne*, 1d. 652.

(*n*) *Attorney-General v. Haberdashers' Company*, 3 Russ. 530. (*p*) *Attorney-General v. Earl of Mansfield*, 2 Russ. 519, per

(*o*) *Attorney-General v. Dixie*, Lord Eldon.

pronounce those measures to be imprudent which the legislature itself has enacted as prudent (*q*).

But the management of the trust may contravene the *letter* of the founder's will, and yet, on a favourable construction, be found conformable to the real intention. Thus where trustees were directed to apply the rents "towards the necessary finding a master, and for the pains of such master," and the trustees applied part of the revenue towards rebuilding and repairing the schoolroom and schoolhouse, it was held to be a good pursuance of the trust, because a schoolroom and house were necessary, and if these were not provided by the trustees, they must have been provided by the master himself, and so it was in effect applied for the pains of the master (*r*).

So an estate had been given to trustees for the *repair* of a church and chapel of ease thereto belonging, and, the parish having taken down the chapel to erect a new one on a different site, it was determined the trustees had not exceeded the line of their duty in expending the accumulated rents upon the *rebuilding* of the chapel; but it was held the *rents* only, and not the *corpus* of the estate, could be so applied; and the Court had great doubts whether any thing could be laid out upon the *fitting-up* of the chapel (*s*).

And where the direction of the founder was that the master of a school should receive 50*l.* a-year, and the usher 30*l.*, and the trustees had raised the salaries respec-

(*q*) *Ib. per eundem.*

(*s*) *Attorney-General v. Feys-*

(*r*) *Attorney-General v. Mayor of Stamford*, 2 Sw. 592.

ter, 1 Aust. 116.

tively to 80*l.* and 60*l.*, as the will did not contain any prohibition against increasing the salaries, and it could not be supposed that the trustees were not under any circumstances to alter the amount, the Court refused to compel the trustees to refund the augmentations (*t*).

And, *vice versa*, if a fund be given, not for purposes of individual benefit, but for the discharge of certain duties, as for the support of a school-master, and the fund increase to such an extent as to yield more than a reasonable compensation for the duties to be performed, the Court will not allow the surplus to be expended unnecessarily, but will order it to be applied for the promotion of some other charitable purpose (*u*).

Legacies had been left by several different testators (between the years 1545 and 1666) for the purpose of being lent out in sums varying from 5*l.* to 200*l.* without interest, and Sir J. Leach was of opinion, that, regard being had to the alteration in the value of money, it was not inconsistent with the intention of the testators to raise the loans to sums varying from 100*l.* to 500*l.* (*x*).

It needs scarcely be remarked that a trustee would be guilty of a gross breach of trust, should he keep the charity fund in his hands, and not apply it, as it becomes payable, to the objects of the trust (*y*).

It is a general rule, that trustees of charities have no authority to make an absolute disposition of the charity estate: they could not, for instance, part with *lands* to a purchaser, and substitute instead the reservation of a

(*t*) *Attorney-General v. Dean of Christchurch*, 2 Russ. 321.

376, see 394.

(*u*) *Attorney-General v. Master of Brentwood School*, 1 M. & K.

(*x*) *Attorney-General v. Mercers' Company*, 2 M. & K. 654.

(*y*) *Duke*, 116.

rent (z). And as the trustees may not aliene absolutely, so they may not accomplish the same end indirectly by demising for long terms as for 999 years (a), or for terms of ordinary duration with covenants for perpetual renewal (b).

But there is no positive rule that in *no* instance shall an absolute disposition be made, for then the Court itself could not authorize such an act—a jurisdiction which, it is acknowledged, has frequently been exercised: the true principle is, that an absolute disposition is then only to be considered a breach of trust when the proceeding is inconsistent with a provident administration of the estate for the benefit of the charity (c). A house which had formerly produced a large income by being let in apartments had afterwards fallen into a state of dilapidation and become unproductive: the charity had no funds to rebuild, but the materials and site were of considerable value. The Master having reported that it would be for the advantage of the charity to dispose of the house, Sir W. Grant, on the authority of a precedent which was produced to him, directed a sale (d).

Governors of charities cannot grant leases to or in trust for one of themselves, for no trustee can be a tenant, and the court will charge him with an occupation rack-rent (e). So a lease should not contain any co-

(z) *Blackston v. Hensworth Hospital*, Duke, 49; and see *Attorney-General v. Buller*, Jac. 412.

(a) *Attorney-General v. Green*, 6 Ves. 452.

(b) *Lydiatt v. Foach*, 2 Vern. 410; *Attorney-General v. Brooke*, 18 Ves. 326.

(c) *Attorney-General v. Warren*, 2 Sw. 302; *S. C. Wils.* 411.

(d) *Anon. case*, cited *S. C.* 2 Sw. 300, 302.

(e) *Attorney-General v. Dixie*, 13 Ves. 519, see 534; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, see 500.

tenant for the private advantage of the trustees : where a corporation directed the insertion of a covenant that the lessee should grind at the corporation mill, in a suit for the establishment of the charity the corporation was, for this instance of misbehaviour, disallowed their costs (*f*).

Where trustees have a power given to them in general terms to grant leases, it is said they may take fines or reserve rents as, according to the circumstances of the case, may be most beneficial to the charity (*g*).

In granting leases of charity lands, the two principal points to be attended to are, first, that the lease be for an adequate consideration, and, secondly, that it be for a proper and reasonable term. Where either of these ingredients is wanting, the Court will interfere and order the lease to be cancelled, and with the lease will also cancel the covenants (*h*).

First, the lease may be annulled on the mere ground of undervalue (*i*) ; but it must be an undervalue satisfactorily proved and considerable in amount : it is not enough to show that a little more might have been got for the estate than has been actually obtained : still less is it sufficient to infer the under-letting from the value of the property at some subsequent period (*k*).

(*f*) *Attorney-General v. Mayor of Stamford*, 2 Sw. 592, 593.

(*g*) *Id.* 592.

(*h*) *Attorney-General v. Morgan*, 2 Russ. 306.

(*i*) *East v. Ryal*, 2 P. W. 284 ; *Attorney-General v. Lord Gower*, 9 Mod. 224, see 229 ; *Attorney-General v. Magwood*, 18 Ves. 315 ; *Attorney-General v. Dixie*,

13 Ves. 519 ; *Poor of Yervel v. Sutton*, Duke, 43 ; *Eltham Parish v. Warreyn*, Duke, 67 ; *Wright v. Newport Pond School*, Duke, 46 ; *Rowe v. Almsmen of Tavistock*, Duke, 42 ; *Crouch v. Citizens of Worcester*, Duke, 33.

(*k*) *Attorney-General v. Cross*, 3 Mer. 541, per Sir W. Grant.

Even where it was ordained at the creation of the trust, that no lease should be made for above twenty-one years, and *the rent should not be raised*, it was held the trustees would not be justified in granting leases from time to time at no more than the original reservation. Lord Cowper said, "That the rent should not be raised was a constitution just and charitable for the encouragement of the tenant to improve the estate, and he ought to find a benefit by it; and the hospital also would find an advantage in having the rent well secured by an estate of greater value, and consequently paid; but the rule or constitution was not to be followed according to the letter that no more rent was to be taken than what was at first reserved, but as the times altered and the price of provisions, &c. increased, so the rent ought to be raised in proportion (l)."

But, in considering the question of value it must be remembered that the case of a charity estate is one in which, of all others, the *security* of the rent is the first point to be regarded, and therefore the inadequacy of the amount reserved is less a badge of fraud in this than it would be in almost any other instance (m). And Lord Eldon desired it might not be considered to be his opinion that a tenant who had got a lease of charity lands at too low a rate with reference to the actual value was therefore to be turned out, if it appeared he had himself acted fairly and honestly. The only ground for so dealing with him would be some *evidence* or *presumption* of collusion or corruption of motive: if, for instance, the

(l) *Watson v. Hinsworth Hospital*, 2 Vern. 596; and see *Lydiatt v. Foach*, Id. 410; *Attorney-General v. Master of Catherine Hall*,

Cambridge, Jac. 381.

(m) *Ex parte Skinner*, 2 Mer. 457, per Lord Eldon.

tenant happened to be a relation of the trustee that was a circumstance to create suspicion (*n*).

When leases are set aside for undervalue, and the Court awards a *compensation* to the charity, the burthen will fall upon the trustees or the tenant according to the circumstances of the transaction (*o*).

2. The lease may be invalidated on the ground of the unreasonable extent of the term.

The duration of the lease should be such only as is consistent with the fair and provident management of the estate (*p*). It would, therefore, be a direct violation of duty to grant a lease for 1000 years (*q*), not only on the ground before noticed that such a demise would in effect be an absolute alienation, but also on the principle that no private proprietor would choose to debar himself from profiting by the progressive improvement of the property. Sir Thomas Plumer observed, "It is impossible to deny that such a lease is a decisive breach of trust. The compensation which the trustees receive may be adequate at the date of the contract, but they are precluded for 1000 years from any advantage of increased value. It is true they are secured from *diminution*, and in some instances to guard against fluctuation may be as much

(*n*) *Ex parte Skinner*, 3 Mer. 457.

(*o*) *Duke*, 116; *Poor of Yervel v. Sutton*, Id. 45; *Attorney-General v. Mayor of Stamford*, 2 Sw. 592, *per cur.*; and see *Attorney-General v. Dixie*, 13 Ves. 540; *Rowe v. Almsmen of Tavistock*, Duke, 42.

(*p*) See *Attorney-General v.*

Owen, 10 Ves. 560; *Attorney-General v. Brooke*, 18 Ves. 326; *Attorney-General v. Griffith*, 13 Ves. 575.

(*q*) *Attorney-General v. Green*, 6 Ves. 452; *Attorney-General v. Cross*, 3 Mer. 540; *Attorney-General v. Dixie*, 13 Ves. 531; *Attorney-General v. Brooke*, 18 Ves. 326.

the interest of one party as the other; but that would be an answer to all cases in which the trustees have made an alienation at a fixed rent. It is not fitting for trustees to divest themselves of the power of profiting by change of value. The progress of events and the depreciation of money have shewn the improvidence of such agreements. At the same time," continued his Honor, "it is just to say, that these principles seem not to have been acted upon at so early a period as 1670. There is no case produced in which mere improvidence, inferred solely from the extent of the term, was held sufficient to rescind the transaction. In many cases in Duke's collection the Court acted on inadequacy of value, in none on mere extent of term (*r*). Where the alienation appeared at the time to be a provident administration, the prospective possibility that it might become inadequate does not appear, at that period, to have had the effect which it does at present (*s*)."

Husbandry or *farm* leases should be granted for a term certain not exceeding twenty-one years (*t*). But neither is this rule to be taken as absolutely inflexible; but where the alienation is for any longer period, as for ninety-nine years, the Court would put it upon those who are dealing *for* and *with* the charity estate to shew the reasonableness of such a transaction, for *prima facie* it is un-

(*r*) But see *Poor of Yervel v. Sutton*, Duke, 43, resolution 2; *Rowe v. Almsmen of Tavistock*, Id. 42; *Wright v. Newport Pond School*, Id. 46; *Crouch v. Citizens of Worcester*, Id. 33.

(*s*) *Attorney-General v. Warren*, 2 Sw. 304.

(*t*) See *Attorney-General v. Owen*, 10 Ves. 560; *Attorney-General v. Backhouse*, 17 Ves. 291; *Rowe v. Almsmen of Tavistock*, Duke, 42; *Wright v. Newport Pond School*, Id. 46; *Poor of Yervel v. Sutton*, Id. 43, resol. 2.

reasonable. There is no instance of a power in a marriage settlement to lease for ninety-nine years, except with reference to very particular circumstances: the ordinary husbandry lease is for twenty-one years (u).

In *Attorney-General v. Cross* (x) the trustees had been in the habit of granting leases for ninety-nine years *determinable on lives* in consideration of fines and the reservation of a small rent, a mode of letting very general in the county where the lands were situate, and one which it was proved had been adopted by the founder himself. On a bill filed to set aside such a lease, Sir W. Grant said, "It is very difficult to lay down any abstract proposition as to the propriety or impropriety of leasing charity estates in the manner complained of. Such a mode of letting, *generally* objectionable, may *under particular circumstances* be the most beneficial that can be adopted. With respect to a charity indeed, the reason against it is stronger than as to private estates, because the purposes of the charity may be suffered to languish during the intervals between the leases; but still even as to charity estates it is impossible to lay down any general rule. Though the expediency of letting charity estates in this manner may be more or less questionable according to the nature of the charity and the circumstances and situation of the estate, I am not aware of any principle or authority on which it can be held that such a lease is on the very face of it a breach of trust. The legislature has both in enabling and disabling statutes considered leases

(u) *Attorney-General v. Owen*, 10 Ves. 560, *per* Lord Eldon; and see *Attorney-General v. Griffith*, 13 Ves. 575; *Attorney-General v. Backhouse*, 17 Ves. 291; *Attorney-General v. Brooke*, 18 Ves. 326; *Attorney-General v. Lord Hotham*, T. & R. 216.

(x) 3 Mer. 524.

for three lives as on a footing with leases for twenty-one years absolute. So have the founders of charities who prohibited the letting on lease for more than three lives or twenty-one years. Supposing, however, that where charity estates have been letten for twenty-one years it would be considered as improper to substitute a letting for lives, it does not follow that we can impute abuse to a mere adherence to the ancient and uniform mode of letting, especially when it is a mode usual in the district in which the estates are situate. In laying down prospective rules for the regulation of a charity, it may be very fit to consider which mode is best calculated to answer the particular purposes of such charity; but to set aside such a lease already existing it is not enough to say that the mode of letting is not the best that might be prescribed, because on such a point there may be a great difference of opinion among the most experienced; but you must shew the mode is so positively bad, that no persons meaning fairly to discharge their trust would have resorted to it. This may be said of a lease for a long term of years absolute at a stationary rent, because no man of a reasonable degree of providence would so let his own estate; but many landowners do still let their estate upon leases for lives, and formerly the general usage of this county was to let in this manner." And upon these grounds his Honor dismissed the bill, and allowed the trustees their costs out of the charity estate.

And in a late case, where charity lands had for 200 years been let for lives upon a fine or foregift at a small reserved rent, Lord Langdale said there was no principle that a lease of a charitable estate for lives was, on the face of it, a breach of trust; and as there appeared no

other ground of invalidating the leases, he would not set them aside (*y*).

Building leases should be for a term not exceeding sixty or ninety years (*z*). If granted for a longer period, it would be thrown upon the parties to show the reasonableness of the prolonged term from the particular circumstances of the case.

What has been said as to the proper duration of leases is of course only applicable where the founder himself has not otherwise given directions, for in all cases the will of the founder, where explicit, must be strictly followed, and even the Court itself cannot sanction a deviation; as if the terms of the endowment be that the charity estates shall be let for twenty-one years, the Court, though the Master might certify that leases of ninety-nine years would be more beneficial, could not make an order to that effect. The charity cannot be administered against the founder's intent without the authority of an express act of Parliament (*a*).

(*y*) *Attorney-General v. Crook*, 17 Ves. 291.
1 Keene, 121, see 126.

(*a*) *Attorney-General v. Mayor*

(*z*) See *Attorney-General v. Owen*, 10 Ves. 560; *Attorney-Ge-*

of Rochester, 2 Sim. 34.

CHAPTER XXI.

OF THE POWERS OF TRUSTEES.

THE powers of trustees are either *general* or *special*: the former, such as by construction of law are incident to the office of trustee; the latter, such as are communicated by the settlor himself by an express proviso in the instrument creating the trust.

I. Of general powers.

In a court of law the trustee as the absolute proprietor may of course exercise all such powers as the legal ownership confers; but in equity the *cestui que trust* is the absolute owner, and the question we have to consider in this place is, how far the trustee may deal with the estate without rendering himself responsible in the forum of a court of equity.

With reference to the *simple trust*, as the trustee is a mere passive depositary, he can neither take any part of the profits, nor, except in defence or protection of the estate, can exercise any dominion or control over the *corpus*. In the *special trust* the authority of the trustee is equally limited, except so far as the execution of the trust itself may invest him with a proprietary power. But the duties thus prescribed to him the trustee is bound strictly to pursue without swerving to the right hand

or to the left; as if money be given to be laid out in a purchase of lands, he would not be justified in expending part on a purchase and applying the residue upon repairs and improvements (a).

But, *under particular circumstances*, the trustee is held capable of exercising the discretionary powers of the *bond fide* proprietor; for the trust estate itself might otherwise be injuriously affected. The necessity of the moment may demand an immediate decision, while the sanction of the parties who are beneficially interested cannot be procured without great inconvenience, as where the *cestuis que trust* are a numerous class, or perhaps cannot be obtained at all, as where the *cestuis que trust* are under disability, or not yet in existence. The alternative of instituting a suit for the mere purpose of consulting the Court would always be attended with considerable expense, and, it may be, an expense wholly disproportioned to the importance of the occasion. It is evidently in furtherance of the *cestui que trust's* own interest, that, where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power.

Upon these grounds it is a rule of equity, that what is compellable by suit is equally valid if done by the trustee *without suit* (b).

Thus an executor may appropriate a legacy, where the appropriation is such as the Court itself would have directed (c).

(a) *Bostock v. Blakeney*, 2 B. 2 Ed. 153, *per* Lord Northington; C. C. 653. *Terry v. Terry*, Gilb. 11, *per* Lord

(b) *Lee v. Brown*, 4 Ves. 369, Cowper.

per cur.; *Earl of Bath v. Bradford*, 2 Ves. 590, *per* Lord Hardwicke; *Cook v. Parsons*, Pr. Ch. 185, *per cur.*; *Inwood v. Twyne*, (c) *Hutcheson v. Hammond*, 3 B. C. C. 128, see 145, 148; and see *Cooper v. Douglas*, 2 B. C. C. 231.

So, where a legacy is left to an infant, and the Court, upon application, would from the inability of the parent to support his child order maintenance out of the interest, the trustee, should he make advances for that purpose without suit, would be allowed them in his account (*d*). In the case of *Andrews v. Partington* (*e*) Lord Thurlow refused to indemnify the trustee; but the authority of that decision has been repeatedly denied, and may be considered as overruled (*f*).

Where the amount of the legacy is inconsiderable, as 100*l.*, the Court would, in the absence of other means, direct maintenance to the child out of the *principal* itself (*g*): the executor, therefore, who, under similar circumstances, but without the authority of the Court, broke in upon the capital, would not be liable, on the *cestui que trust's* coming of age, to account for the expenditure (*h*). However, where the legacy was not more than 300*l.*, Sir W. Grant determined that the trustee had exceeded his duty, and said his *impression* was, that the rule had been *never* to permit trustees of their own authority to break in upon the capital (*i*); but the case of *Barlow v. Grant*, which is clearly to the contrary, must have escaped his Honor's recollection. In *Swinnock v. Crisp* (*j*), where the legacy was 250*l.* to be divided amongst three children, the executrix, who was the mother, was *not* allowed the sums which she had paid

(*d*) *Sisson v. Shaw*, 9 Ves. 285.

(*e*) 3 B. C. C. 60.

(*f*) See *Sisson v. Shaw*, 9 Ves. 288; *Maberly v. Turton*, 14 Ves. 499; *Lee v. Brown*, 4 Ves. 369; *ex parte Darlington*, 1 B. & B. 241.

(*g*) *Ex parte Green*, 1 J. & W. 253; *ex parte Chambers*, 1 R. &

M. 577; *ex parte Swift*, *Ib.* 575;

in re Mary England, *Id.* 499;

Harvey v. Harvey, 2 P. W. 21.

(*h*) *Barlow v. Grant*, 1 Vern. 255.

(*i*) *Walker v. Wetherell*, 6 Ves. 473.

(*j*) *Freem.* 78.

out of the principal; but the ground of the decision was the notion, since overruled, that the executrix, though she had married again, was under a legal obligation, as mother, to provide a maintenance for her children (*k*). Where the legacy is considerable, as 1,000*l.* or the like, as the Court itself would not order the application of part of the principal, the trustee would not be justified in exceeding of his own authority the amount of the interest (*l*).

A part of the capital may be sunk by a trustee without the direction of the Court for the *advancement* of a child, where the same sums if expended for *maintenance*, would not have been allowed (*m*).

In *Smee v. Martin* (*n*) a testator gave 100*l.* to A. B. "not to be paid until he came of age, and in the mean time 5*l.* per annum to be allowed out of the testator's estate for his maintenance." The executrix, who was his mother, had expended in binding him apprentice, fitting him out for India, and other necessities, more than 100*l.*, and the Court decreed the payment of the legacy in full without any deduction for the disbursements. "The mother," it was said, "ought by nature to provide for the maintenance and education of her own son; besides, it appeared plainly the intention of the testator that the 100*l.* should not be touched until A. B. came of age, for there was a yearly allowance in the meantime of 5*l.*, and it was at her peril that she exceeded that." The case therefore does not militate with the general rule, but was de-

(*k*) *Billingsly v. Critchett*, 1 B. 3 B. C. C. 178.

C. C. 268.

(*m*) *Swinnock v. Crisp*, Freem.

(*l*) *Barlow v. Grant*, 1 Vern. 78; and see *ex parte M'Key*, 1 255, per Lord Guildford; *Davies* B. & B. 405.

v. Austen, 1 Ves. jun. 247; *S. C.* (*n*) Bunb. 136.

terminated upon the particular circumstances, that the executrix, as mother, was herself liable for the maintenance of the child, and that the expenditure of part of the capital was against the clear intention of the testator.

But a trustee cannot apply part of the principal towards the advancement of the child where the legacy is subject to a limitation over in favour of a stranger, for in such a case the Court itself would not be authorized to make an order to that effect.

Thus in *Lee v. Brown* (o), where a testatrix gave 100*l.* to trustees upon trust to apply the produce to the maintenance and education of A. B., and when he should attain twenty-one to transfer to him the capital, but in case he died under that age the testatrix gave the legacy to his brother and sister equally, Lord Alvanley said, "It certainly was not competent under this trust to the executor, nor could he, *if he had applied*, have obtained permission from this Court, to advance any part of the capital of the legacy in putting the child out in the world; for *if it had been such a case that the Court would have authorized the act that was done, I desire to be understood that it would be considered as properly done; for the principle is now established, that if an executor does without application what the Court would have approved, he shall not be called to account and forced to undo that merely because it was done without application* (p)."

But where legacies were given to children payable at twenty-one or marriage, with a limitation over on the death of any child before attaining twenty-one or marriage, *not in favour of a stranger, but for the benefit of such of the children as should attain twenty-one or marry*, a trustee, who had paid a premium on the apprenticeship

(o) 4 Ves. 362.

(p) Id. 369.

of a child, who died under twenty-one, was allowed it by the Court (*q*). The case turned upon the same principle as where a legacy is given to a class, all or some of whom must take the fund absolutely, when, as all have an equal chance of survivorship, the individuals of the class will be ordered maintenance even before their shares in the fund have become actually vested (*r*).

The rule, that what is compellable by suit is equally valid if done without suit, must be received with this qualification, that if a suit has been already instituted for the execution of the trust, that takes the administration out of the hands of the trustee and transfers it to the Court: the original power of the trustee is from that moment paralyzed, and the authority of the Court must sanction every subsequent proceeding (*s*).

A trustee, under circumstances, may release or compound a debt. Thus, where the tenant of part of the trust estate owed 225*l.* for arrears of rent, and afterwards became insolvent, and the trustee released the debt and gave a bonus of 20*l.* on condition the tenant should give up the premises, which was done, it was argued that the trustee, before he made the release, should have consulted the *cestuis que trust in esse* for their consent; and, in case of their obstinacy, should have applied to the Court for directions; and though it might be true that the tenant was at the time insolvent, yet thereafter he might have become solvent and able to pay the rent; and as to

(*q*) *Franklin v. Green*, 2 Vern. appears from Reg. Lib.

137. That the limitation over was (r) See *Rop. Leg.* ch. 20, s. 5.
for the benefit of the children is (s) *Walker v. Smalwood*, Amb.
not mentioned in the report, but 676; *Anon. case*, 10 Ves. 104.

the gaining of possession, that was of no great value, as there was a proviso in the lease for the landlord's re-entry in case of non-payment of the rent; but Lord Chancellor Talbot said, "The tenant becoming insolvent, the testator's estate has not suffered by this release, in regard if the arrears of rent had not been released, the trustee could never have gotten them when the tenant was unable to pay them; and if the testator's estate has not suffered on account of the release, there is no reason it should gain thereby. The trustee seems to have done nothing but what was prudent. A vexatious tenant may put the landlord to great trouble and delay by a wrongful detainer of the possession, and by damaging the estate in the mean time, and may force the landlord to ejectments, writs of error, and bills in equity, by means of which he may lose not only his accruing rent, but his costs of suit. Neither will I make any difference between the 20*l.* and the release of the arrears, for both were but one entire consideration for the tenant's quitting the possession, and by the same reason that the trustee has been allowed the one he ought to be allowed the other (t)."

But if a trustee release or compound a debt without some sufficient ground in justification of his conduct, he will clearly be answerable to the *cestui que trust* for the amount of the *devastavit* (u).

A trustee may claim to be reimbursed a sum of money *bond fide* advanced by him for the benefit of the *cestui que trust*, or even for his own protection in the execution of his office. Thus, a trustee of 1000*l.* South Sea stock had mortgaged it to the South Sea Company, at the

(t) *Blue v. Marshall*, 3 P. W. 381.

(u) *Jevon v. Bush*, 1 Vern. 342; *Gorge v. Chansey*, 1 Ch. Re. 125.

request of the *cestui que trust*, for 4000*l.* ; some time after, the South Sea bubble bursting, the 1000*l.* stock fell to a mere nominal value. An act having been passed by which it was provided that if any mortgagor to the company should pay 10*l.* per cent. by such a day the debt should be extinguished, the trustee took upon himself to pay the 10*l.* per cent., the *cestui que trust*, who laboured under the impression that a mortgagor was at liberty by forfeiting his pledge to be quit of the debt, refusing to give his consent. The trustee filed a bill against the *cestui que trust* to recover the money which had been disbursed ; and Lord Chancellor King, in deciding for the plaintiff, observed, " When money is borrowed, it ought to be repaid, and though a pledge was given for it, if that proves insufficient, the borrower ought to be liable. But if in the present case there was only a *hazard*, the trustee ought not to continue liable to such hazard : on the contrary, as it is a rule that the *cestui que trust* ought to save the trustee harmless, so, within the reason of that rule, when the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from being liable for the whole money lent, or from a plain and great hazard of being so, he ought to be repaid (x)."

It has been held that a trustee of lands may grant a reasonable lease. Thus, a testator had devised an estate to two trustees in fee upon trust out of the yearly rents and profits to pay two annuities of 60*l.* and 10*l.* respectively, and subject thereto upon trust for certain persons successively for life, with remainder to their issue. The trustees granted a lease of the lands for the term of ten

(x) *Balsh v. Hyham*, 2 P. W. 453.

years, and Sir John Leach held they had not exceeded their authority (*y*). But it must not be inferred from this case that a trustee is at liberty, except under particular circumstances, to grant other than a husbandry lease, which never exceeds twenty-one years (*z*); and of course he cannot make even that demise where it is a simple trust and the *cestui que trust* is in possession, except indeed he do it with the *cestui que trust's* concurrence.

II. We come to treat of the *special* powers of trustees; and upon this branch of our subject we shall consider, first, The different kinds of powers; secondly, The construction of powers; thirdly, The effect of disclaimer, assignment of the estate, and survivorship among the trustees; and, fourthly, The control of the Court over the exercise of powers.

1. Of the different kinds of powers. In applying the doctrine of powers to the subject of trusts it may be useful to regard powers as either *legal* or *equitable*: the former, such as operate upon the legal estate, and so are matter of conusance to courts of common law; the latter, such as affect the equitable interest only, and so fall exclusively under the notice of courts of equity. Thus, if lands be limited to the use of A. for life, remainder to B. and his heirs, and a power operating under the statute of uses be given to C., the execution of the power works a conveyance of the legal estate; but if lands be limited to the use of A. and his heirs upon trust for B. for life, remainder upon trust for C. and his heirs, and a power, not operating under the statute of uses, be given either to the trustee or to the *cestui que trust*, the execution of such a

(*y*) *Naylor v. Arnitt*, 1 R. & M. 501; and see *Bowes v. East London Waterworks Comp.*, Jac. 324.

(*z*) See *Attorney-General v. Owen*, 10 Ves. 560.

power will have no effect at law, but will merely serve to transfer the beneficial interest in equity, and may therefore be designated by the name of an equitable power.

An equitable the same as a legal power may be either annexed to the estate or be simply collateral; but whether it shall be taken as the one or the other will depend on the question, whether the donee of the power be possessed of the equitable, that is, of the *beneficial* interest or not. Thus, where a testator devised to his sister and her heirs for ever, with a direction to settle the property on such of the descendants of the testator's mother as his sister should think fit, and, the devisee having married, the question was raised whether the execution of the power by her, as she was under coverture at the time, was to be considered as valid, Lord Hardwicke said, "It is objected that a *feme covert* cannot execute a power, and that there are no words in the will authorizing her to do so; but this is a power *without an interest*, and is improperly called a power, for, being a direction to a person who has the fee, it is rather a trust (a)." On the other hand, where the legal estate was devised to trustees upon trust for an infant *feme covert* for her sole and separate use during her life, and upon trust to permit her by deed or writing executed in the presence of three or more witnesses, notwithstanding her coverture, to dispose of the estate as she should think fit, and the testator died leaving the *feme covert* his heir at law, and she, during the continuance of the coverture and infancy, exercised the power by will, Lord Hardwicke, upon the question whether the power had been duly executed, observed, "This is a power *coupled with an interest*, which

(a) *Godolphin v. Godolphin*, 1 Ves. 21.

is always considered different from naked powers. It was admitted that if this execution was to operate on the estate of the infant, it might not be good: now this is clearly so, for she had the trust in equity for life, with the trust of the inheritance in her in the mean time, which would remain in herself, if undisposed of, and descend to her heir; so that this is directly a power over her own inheritance which cannot be executed by an infant (b)."

Again, powers, in the sense in which the term is commonly used, may be distributed into *mere powers*, and *powers coupled with a trust* (c). The former are powers in the proper sense of the word; that is, *not imperative*, but purely *discretionary*; powers which neither the trustee can be compelled to execute, nor, on failure of the trustee, can be executed vicariously by the Court. The latter, on the other hand, are *not arbitrary*, but *imperative*, have all the nature and substance of a trust, and ought rather, as Lord Hardwicke observed, to be designated by the name of trusts (d). "It is perfectly clear," said Lord Eldon, "that where there is a *mere power*, and that power is not executed, the Court cannot execute it. It is equally clear, that wherever a *trust* is created, and the execution of the trust fails by the death of the trustee or by accident, this Court will execute the trust. But there are not only a *mere trust* and a *mere power*, but there is also known to this Court a *power which the party to whom it is given is intrusted and required to execute*; and, with

(b) *Hearle v. Greenbank*, 1 Ves. 298, see 306; and see *Blithe's case*, 2 Ves. 89; *Cole v. Wade*, 16 Ves. 43.

Freem. 91; *Penne v. Peacock*, For. 43. (d) *Godolphin v. Godolphin*, 1 Ves. 23.

(c) See *Gower v. Mainwaring*,

regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has the duty imposed upon him does not discharge it, the Court will to a certain extent discharge the duty in his room and place (e)."

Again, powers have been dealt with by the Court as either of a *strict* or of a *directory* character: the former such as can only arise under the exact circumstances prescribed by the settlement; the latter, such as being merely monitory, may be taken with a degree of latitude. Thus, where an advowson was vested in trustees upon trust to elect and present a fit person *within six months* from the incumbent's decease, it was considered the clause was *directory*, and that the trustees might equally elect and present, although that period had elapsed (f). So where six trustees were empowered *when reduced to three* to substitute others, and all died but one, it was held competent to the sole survivor to fill up the number (g). And where, in the case of twenty-five trustees, the direction was, that *when reduced to fifteen* the survivors should nominate, it was determined by the Court, that, although seventeen remained, the survivors were *at liberty* to exercise their power, but that when reduced to only fifteen, they were *compellable* to do so (h).

2. We proceed to consider the construction of powers.

If a power be given to "A. and B. and their heirs," it is perfectly clear that the words are not to be understood to this extent, that, as the limitation of an estate in such

(e) *Brown v. Higgs*, 8 Ves. 570. *General v. Bishop of Litchfield*,

(f) *Attorney-General v. Scott*, 5 Ves. 825; but see *Foley v.*
1 Ves. 413, see 415. *Wontner*, 2 Jac. & Walk. 245.

(g) *Attorney-General v. Floyer*, (h) *Doe v. Roe*, 1 Anst. 86.
2 Vern. 748; and see *Attorney-*

terms would so vest it in the grantees that they might convey it to a stranger, and the survivor devise it, the power is to be construed as intended in like manner to be assignable and devisable (i).

Upon the subject of such a power we have the following pointed remarks of Lord Chief Justice Wilmot: "It is asked," he said, "what must become of the power upon the death of one of the trustees. It must be considered as a tenancy in common. Had the words been 'their several and respective heirs,' it would have been clear; and in common parlance, and according to the common apprehension of mankind, when an estate is given to two men and their heirs, no one not illumined with the legal nature of joint-tenancy could ever conceive the estate was to go to the heirs of the survivor. It is equivalent to saying, *With consent of both while they live; but when one dies, that consent shall devolve upon his heir; the heir of the dead trustee shall consent as well as the surviving trustee. One may abuse the power; I will supply the loss of one by his heir, and the loss of both by the heirs of both* (k)."

In *Townsend v. Wilson* (l) a power of sale was given to *three trustees and their heirs*; and it was directed that the money to arise from the sale should be paid into the hands of the trustees, *or the survivors or survivor of them*, and the executors administrators or assigns of such survivor. One of the trustees died, and it was determined by the Court of King's Bench, that the survivors alone were incapable of exercising the power.

Lord Eldon has expressed himself dissatisfied with this decision, and asked, Did the Court of King's Bench

(i) *Cole v. Wade*, 16 Ves. 46, 50, 51.

per Sir W. Grant.

(l) 1 B. & A. 608.

(k) *Mansell v. Vaughan*, Wilm.

consider that the two surviving trustees and *the heir of the deceased trustee* were to act together? for it was one thing to say that the survivors could not act until another was appointed; and a different thing to say the heir of the deceased trustee could act in the mean time (*m*).

If a power be given to a "trustee and his executors," and the executor of the trustee die having appointed an executor, the latter executor, though by law the executor not only of his immediate testator but also of the trustee, will not, it seems, be so considered for the purposes of the power (*n*).

A power limited to "executors" or "sons in law" may be exercised by the survivors so long as the plural number remains (*o*); and if a power be limited to "trustees" we may reasonably conclude it may be exercised by the surviving trustees. And as a power given to "executors" will, if annexed to the executorship, be continued to the single survivor (*p*), so it may be inferred a power communicated to "trustees" will, as annexed to the office itself, be exercisable by the last surviving trustee; but this is not the effect of the wording of the power, the subject we are now discussing, but results from the survivorship of the estate, of which we shall speak presently.

A power to four trustees "and the survivors of them" cannot, it seems, be executed by the single survivor (*r*);

(*m*) See *Hall v. Dewes*, Jac. 193. & K. 561.

(*n*) See *Cole v. Wade*, 16 Ves. 44; *Stile v. Tomson*, Dyer, 210 a; Perk. sect. 552. (*r*) *Hibbard v. Lambe*, Amb. 309. Note, further directions were declared necessary on the death of *either* of the surviving executors.

(*o*) Sug. Powers, c. 3. s. 2.

(*p*) *Ib.*

(*q*) See *Down v. Worrall*, 1 M.

for though a power to trustees may, in general cases, be held to survive, an intention to the contrary may here be fairly inferred: the settlor may be supposed to have said, 'I repose a confidence in any two of the trustees jointly, but in neither of them individually.' But it does not follow that if a power be limited to four trustees "and the *survivor* of them," it may not be exercised, on the death of one, by the survivors; for it seems difficult to imagine any reason why a person who trusted the four jointly, and each of them individually, should refuse to repose a confidence in the survivors for the time being (*s*).

The point decided in *Cole v. Wade* (*t*) will be best understood by a brief statement of the case. A testator gave the residue of his real and personal estate to Ruddle and Wade (whom he appointed his executors), their executors, administrators, and assigns, and directed *his said trustees and executors*, after making certain payments thereout, to convey and dispose of the said residue of his real and personal estate unto and amongst such of his relations and kindred in such proportions, manner, and form, as *his said executors* should think proper, his intention being that every thing relating to that disposition should be entirely in the discretion of *the said trustees and executors, and the heirs, executors, and administrators of the survivor of them*; and the testator directed *his said trustees and executors and the survivor of them, and the heirs, executors, and administrators of the survivor of them* to mortgage or sell the said residue, or such part thereof as they in their discretion should

(*s*) See *Crewe v. Dicken*, 4 Ves. the survivors would have been a sufficient discharge.
 97; in which case it seems to have been assumed that the receipt of

(*t*) 16 Ves. 27.

think proper ; the testator meaning to leave it in the discretion of *his said trustees and executors* to convey unto his relations the said residue in such manner and form as *his said trustees* should think proper ; and, lastly, he directed that *the said Ruddle and Wade, or the survivor of them, or the heirs, executors, or administrators, of such survivor*, should make the division within fifteen years from the testator's decease. Wade, the survivor, devised and bequeathed the real and personal estate of the testator to William and Edward Bray, their heirs, executors, administrators, and assigns, upon the trusts of the will, and named them his executors for that specific purpose only, appointing his wife and another person executors as to his own estates. The question was agitated, whether William and Edward Bray could exercise the power of distribution among the relations. Sir W. Grant said, " The original trustees and executors were the same persons : all the real and personal estate was vested equally in them ; but the heirs and executors of the surviving trustee might be different persons ; yet all the directions about the distribution of the residue proceed upon the supposition that the same persons are to select the objects and settle the proportions in which they are to take ; but if the real estate is to go to one, and the personal estate to another, the testator has left it entirely uncertain how the power is to be executed. Whether the Messrs. Bray can in any sense be the executors of Wade, with whose own property they are not to intermeddle, it is not material to determine." His Honor, therefore, decided, that the power had become extinguished.

3. As to the effect of disclaimer, assignment of the estate, and survivorship among the trustees.

If a power be given to co-trustees, and one of them *disclaim*, it seems the power may be exercised by the continuing trustee or trustees.

Jenkins observes, "If a testator devise that A. and B. shall sell, and near the end of the will he names them executors, if one refuses at common law (*u*), or dies, the other may sell, for *the power is annexed to the executorship* (*x*);" and in the instance of trustees, it may equally be argued that although given to persons by name, the power is annexed to the trusteeship.

And of this opinion apparently was Lord Loughborough in the case of *Crew v. Dicken* (*y*); for a power of signing receipts having been limited to three trustees by name, and one of them being dead, his Lordship remarked, "If A. B. (one of the survivors) had *renounced*, that is, had *disclaimed* instead of constructively accepting the trust by the execution of a *conveyance*, the whole estate would have been in the continuing trustee exactly as if the two other trustees had died in the life of the testator;" and it is evident from the context that his Lordship meant to extend the observation to the power of signing receipts.

The case of *Adams v. Taunton* (*z*) is a direct decision by Sir J. Leach to the same effect. A testator had devised his estates to A. and B. upon trust to sell and apply the proceeds amongst his children, and declared that the receipts of the said A. and B. should be sufficient discharges. A. renounced, and Sir J. Leach, after having taken time to consult the authorities, said,

(*u*) That is independently of 21 H. 8, c. 4, which, upon refusal by one executor, authorized a sale by the co-executor.

(*x*) Jenk. 44.

(*y*) 4 Ves. 97.

(*z*) 5 Mad. 435.

"It being now settled that a devise to A., B., and C. upon trust is a good devise to such of the three as accept the trust, it follows by necessary construction that by the receipts of the trustees is to be intended the receipt of those who accept the trust (a)."

As to the effect of *assignment*, it is clear the power is not appendant to the estate, so as to follow along with it in every transfer by the party, or devolution by course of law (b). Even where a new trustee, is appointed by the Court, the conveyance from the old trustee to the new trustee will not have the effect of communicating the power (c).

We have seen that if one trustee *disclaim* in the strict sense of the word, the power will not be extinguished, but will survive to the co-trustee; but, according to the old doctrine, if a trustee instead of *disclaiming* had *released* the estate, that was a virtual acceptance of the trust, and then the conveyance of the retiring trustee did not pass the power into the hands of the continuing trustee (d); but at the present day it seems a release with the intention of disclaimer would have all the operation of a formal and actual disclaimer (e).

The transfer of the estate, as it will not communicate the power to the grantee, so it will not in all cases withdraw it from the grantor: the guardianship of the pro-

(a) From his Honor's words, "the receipts of the trustees," it might be thought the power had been given not to A. and B. by name, but to "the trustees:" the R. L. has been consulted, and it appears, as stated in the report, that the power was given to "the said A. and B."

(b) *Cole v. Wade*, 16 Ves. 47,

per Sir W. Grant; *Crewe v. Dicken*, 4 Ves. 97.

(c) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; and see *Cole v. Wade*, 16 Ves. 44, 47; *Hibbard v. Lambe*, Amb. 309.

(d) *Doyley v. Attorney-General*, *ubi supra*; *Crewe v. Dicken*, 4 Ves. 97.

(e) *Supra*, p. 226.

perty may be committed to one set of trustees, while the exercise of the discretion may remain with another. A testator gave a sum of money to be invested in the funds in the names of the head of a college at Oxford, the junior bailiff of the city, and the elder churchwarden of a parish, the dividends to be applied to certain purposes as the trustees should approve. The bailiff and churchwarden being *annual* officers, the investment as directed by the will would have been accompanied with frequent transfers of the stock: the Court therefore ordered that the money should be invested in the names of two new trustees jointly with the head of the college, but that the objects of the charity should be nominated and approved in the manner pointed out by the will (*f*).

Next as to *survivorship*. If a *legal* power be given to A., B. and C., and one of them die, it is perfectly clear the power cannot be exercised by the survivors; but if trustees have an equitable power, as if an estate be vested in three trustees and a power is conferred upon them relative to the trust, it is a question whether, as the power is coupled with an interest and the interest survives, the power shall not also survive (*g*).

“If a man,” says Lord Coke, “deviseth land to his executors to be sold, and maketh two executors, and the one dieth, yet the survivor may sell the land, because as the estate, so the trust shall survive; and so note the diversity between a *bare trust* and a *trust coupled with an interest* (*h*).”

(*f*) *Ex parte Blackburne*, 1 J. & W. 297; and see *Hibbard v. Lambe*, Amb. 809. *Mansell v. Faughan*, Wilm. 49; *Eyre v. Countess of Shaftesbury*, 2 P. W. 108, 121, 124.

(*g*) Besides the authorities presently noticed, see Gouldsb. 2, pl. 4; *Peyton v. Bury*, 2 P. W. 628;

(*h*) Co. Lit. 113. a.; and see Ib. 181. b.

At the present day a *trust*, that is, a *power imperative*, whether it were a bare trust or a trust coupled with an interest, would equally be carried into execution in the *forum* of a court of equity; for the maxim now is, The trust is the estate: but in the time of Lord Coke had a mere authority been devised to A. and B. to sell an estate, as for payment of debts, the authority was one which A. and B. during their joint lives were compellable by *sub-pœna* in Chancery to execute for the benefit of the creditors; but if A. happened to die before the sale had been carried into effect, the trust was extinguished, and the heir, who had always retained a right to the intermediate rents and profits, was now seised of the absolute and indefeasible inheritance. But in case the testator had *devised the estate* to A. and B. to sell for payment of debts, then, as the trust was not a mere power, but a power coupled with an interest, it received a more liberal construction: as upon the death of A. the whole estate passed by survivorship to B., it was argued, that as the power was annexed to the estate, it was intended to survive with it. The position of Lord Coke, therefore, would seem to authorize the conclusion, that a *power imperative* given to trustees (for so a *trust* in the form of a *power* was then construed,) might be executed by the survivor (1).

(1) With respect to the cases of powers before the Statute of Uses the following points may be usefully noticed:—1. A person seised of the legal estate of lands could not, before the Statute of Wills, have devised them directly, and therefore he could not have gained his object indirectly by means of a power: had a testator devised that A. and B. should sell his estate, the authority was void. (But a *use* was devisable, and therefore, if *cestui que use* had devised the lands to a stranger, though the legal estate did not pass (the statute of Richard the Third, which made mention of feoffments and grants, not extending to wills,) the devisee might still

The case of *Butler v. Bray* (i) is an authority in favour of the same doctrine. Lord Bray for 8000*l.* bargained and sold to Lord Chancellor Audeley, Lord Cromwell, Sir William Pawlett, and Sir John Russell, as trustees for king Henry the Eighth, the marriage of John Bray, his son and heir apparent, to the intent his son should be married at the appointment and nomination of *them* (the trustees) *and their assigns*. Lord Cromwell died, and the marriage was afterwards concluded upon the nomination and appointment of the survivors. Judge Weston

(i) Dyer, 189, b.

have sued his *subpoena* in Chancery, and have compelled the feoffees to execute a conveyance of the estate.) 2. If *cestui que use* had devised that A. and B. should sell, and A. and B. in pursuance of the authority had made a feoffment or grant, this assurance seems to have operated retrospectively as the assurance of the testator, and so, falling within the words of the statute of Richard, served to pass even the legal estate; and *cestui que use* might have devised such an authority even to his feoffees, and the power would have been construed in the same manner as if it had been devised to a stranger: thus where a man enfeoffed A. and B. to his own use, and afterwards devised that the said A. and B. should sell the estate and apply the proceeds, &c., and A. and B., on the decease of the testator, enfeoffed C. and D. to the like uses, it was ruled that A. and B. might still sell under the power, although they had parted with the legal fee. 3. Until the sale was effected, the feoffees were trustees for the testator's heir, and were bound to account to him for the accruing rents and profits; and if the power, which, whether given to a stranger or to the feoffees, was construed as a naked authority, became extinguished by any means, as by the death of the donees of the power, the heir was as absolutely entitled to the use in fee, as if no will had been made. 4. But so long as the power subsisted, the person who would suffer by the extinguishment of the power might have compelled the donees, by filing a bill in Chancery, to execute the power. 5. But if the proceeds of the sale were to be distributed *in pios usus*, as no one could plead a personal loss by the non-execution of the power, there was no one to sue a *subpoena*, and the donees of the power were left to the arbitrary exercise of their own discretion. See case *temp. H. 7*, Treat. of Powers, Appendix, No. 1.

argued that *no interest* passed by the bargain and sale, and therefore, by the death of Cromwell, the authority was gone: but Judges Browne and Dyer both held that the trustees *had an interest* in the son's marriage, and therefore the power had survived.

The subject may be further illustrated by the case of executors. If a testator give a power of sale to his executors without naming them, (and *quære*, though he name them,) as the authority is not conferred upon them as individuals, but is annexed to the executorship, and the executorship survives, the power also survives (*k*); and a discretion given to executors, not over real estate, but in respect of personalty, has been held to survive both as annexed to the executorship (*l*), and also on the ground of its being coupled with an interest. Thus, where a testator gave several sums of money to be distributed to charities "at the discretion of his executors," and named three persons executors, and two (*m*) of them died before the power had been executed, Lord Hardwicke said, "I am of opinion the executors, as taking the whole personal estate out of which the charities are to issue, have an authority coupled with an interest, and therefore the power of nominating the several persons who are to partake of the charity is continued to the survivor of them (*n*)."

The just inference from these cases appears to be, that a power communicated to joint trustees may be exercised by the survivors or survivor; but the authorities that

(*k*) See Sugd. Powers, c. 3, s. 2.

(*m*) In Atkyns's report it is stated that only *one* had died.

(*l*) *Flanders v. Clark*, 1 Ves. 9; *Potter v. Chapman*, Amb. 98, see 100.

(*n*) *Attorney-General v. Gleg*, 1 Atk. 356; *S. C.* Amb. 584.

have been cited extend only to powers that are *imperative*, and not to such as are of a mere *arbitrary* character.

Jenkins, with reference to executors, took the following distinction:—"If a man," he said, "devises that A. and B. shall sell his land, and makes them executors, the one cannot sell without the other, though one of them should refuse to be executor or *dis*; for the naming them by their proper names appropriates the trust to A. and B. as private persons: but it seems to me that if a devise be that A. and B. *his executors* shall sell certain lands, and near the end of the will he also names them executors, if the one refuses the executorship or dies, the other may sell, for the interest is *annexed to the executorship (o)*."

Upon the application of this doctrine to the subject of trusts it must be observed, that where a power over lands is given to persons by name who are executors, the presumption *primâ facie* is, that the power was *not* meant to be annexed to the executorship; for executors in that character have no concern with the realty: but if an authority over the trust fund be committed to trustees, the presumption is that, as the power is coupled with an interest, it was meant to survive; and to avoid this effect an intention to the contrary should be proved. And the like distinction seems to prevail in the case of *disclaimer*, for if a power be given to A. and B., who are afterwards named *executors*, and one refuses, that is, renounces, the power is extinguished (*p*); but we have seen, that if a power be given to A. and B., who are *trustees*, and one of them disclaims, the power may nevertheless be executed by the survivor.

(o) Jenk. 44; but see Co. Lit. 112. b; 113. a. (p) Jenk. 44.

IV. Of the control of the Court over the exercise of powers.

In the case of *mere powers*, that is, powers of which the exercise is arbitrary and discretionary, the Court has in general no jurisdiction to interfere.

Thus, in *Pink v. De Thuissey* (*q*) a testatrix gave 1,000*l.* to A. upon a condition precedent, but “left her executor at liberty to give the said sum if he found the thing proper” though the condition should not have been performed. A. died without having fulfilled the condition or received the money, and his personal representative filed a bill against the executor of the testatrix to compel payment of the legacy. Sir T. Plumer, in dismissing the bill, observed, “The executor says he did not think proper to advance the legacy: is the Court to decide upon the propriety of the executor’s withholding the legacy? That would be assuming an authority confided by the will to the discretion of the executor: it would be to *make* a will for the testatrix, instead of *expounding* it.”

But the conduct of the trustee will be the subject of judicial investigation in all cases of *fraud* (*r*); or generally wherever the discretion is *mischievously and ruinously* exercised; as if a trustee be authorized to lay out money upon government, *or* real, *or* personal security, and the trust fund is outstanding upon any *hazardous* security (*s*); and where the trustees of a charity were empowered to lease for three lives or thirty-one years, the Court expressed an opinion that the discretion might be controlled, if it appeared for the benefit of the charity that such a power should not be acted upon (*t*).

(*q*) 2 Mad. 157; and see *French v. Davidson*, 3 Mad. 396; *Walker* (*s*) *De Manneville v. Crompton*, 1 V. & B. 359.

v. Walker, 5 Mad. 424.

(*t*) *Ex parte Berkhamstead*

(*r*) See Sugd. Powers, c. 7.

Free-school, 2 V. & B. 138.

And where a suit has been instituted for the administration of the trust, *that* attracts the Court's jurisdiction, and the trustee cannot afterwards exercise the power without the concurrent sanction of the Court; as if a trustee have a power of appointment of new trustees, he is not excluded from the right of nominating the person, but the Master must signify his approbation of the choice (*u*).

With regard to powers that are *imperative*, and therefore in the nature of a trust, the Court will equally refrain from controlling the trustee in the free exercise of the power, provided he be ready to act upon the dictates of his own judgment (*x*).

Thus, in the common case of a charitable bequest to executors or trustees upon trust to distribute among the testator's relations, or apply the fund to any other specific purpose, in such manner as the executors or trustees may think fit, on a bill filed for carrying the trusts into execution the executors or trustees, if willing to execute the trust, will not be deprived of their discretionary power, but may propose a scheme before the Master for the approbation of the Court (*y*). And where the very objects of the charity are from time to time to be at the discretion of the trustees, as if annual sums be made distributable either to private individuals or public institu-

(*u*) *Webb v. Earl of Shaftesbury*, 7 Ves. 480; and see *Widowson v. Duck*, 2 Mer. 494. Ch. Re. 146; *Wain v. Earl of Egmont*, 3 M. & K. 445; *Livesey v. Harding*, Tam. 460.

(*x*) *Attorney-General v. Governors of Harrow School*, 2 Ves. 551; *Cowley v. Hartstonge*, 1 Dow, 378, per Lord Eldon; *Potter v. Chapman*, Amb. 99, per Lord Hardwicke; *Carr v. Bedford*, 2 (*y*) *Brunsdon v. Woolledge*, Amb. 507; *Bennett v. Honeywood*, id. 708; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Supple v. Lawson*, Amb. 729; &c.

tions, as the trustees may think fit, the Court will not even order a scheme to be proposed, but will leave the trustees to the free exercise of their power with liberty for all parties to apply (*z*).

But in one case, where a suit had been instituted for controlling the discretion of the trustees, Lord Hardwicke said, "though he could not contradict the intent of the donor, which was to leave it in the discretion of the trustees, yet he would not dismiss the information, but would still *keep a hand over them* (*a*)."

And of course there is sufficient ground for the interference of the Court wherever the exercise of the discretion by the trustees is infected with fraud (*b*).

In mere powers, if the trustee refuse to execute them, the Court has no jurisdiction to compel the execution (*c*); for "the Court," said Lord Hardwicke, "cannot look with the eyes of trustees:" but where the power is imperative, it is in fact a trust, and should the trustee be unwilling to exercise it, the Court, rather than the intention should fail, will take the execution upon itself (*d*).

(*z*) *Waldo v. Caley*, 16 Ves. 206; *Horde v. Earl of Suffolk*, 2 M. & K. 59; and see *Powerscourt v. Powerscourt*, 1 Moll. 616.

(*a*) *Attorney-General v. Governors of Harrow School*, 2 Ves. 551.

(*b*) *Id.* 552, *per* Lord Hardwicke; *Potter v. Chapman*, Amb. 99, *per eundem*; *Richardson v. Chapman*, 7 B. P. C. 318; *French v. Davidson*, 3 Mad. 402, *per* Sir J. Leach; *Maddison v. Andrew*, 1 Ves. 59, *per* Lord Hardwicke; *At-*

torney-General v. Glegg, Amb. 585, *per eundem*.

(*c*) *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 61; *Bull v. Vardy*, 1 Ves. jun. 270; *Crossling v. Crossling*, 2 Cox, 396; *Bax v. Whitbread*, 16 Ves. 26, *per* Lord Eldon; *Brown v. Higgs*, 5 Ves. 501, *per* Lord Alvanley; *S. C.* 8 Ves. 570, *per* Lord Eldon; *Down v. Worrall*, 1 M. & K. 561; *Meredith v. Heneage*, 1 Sim. 554, *per* Chief Baron Wood.

(*d*) See *infra*.

CHAPTER XXII.

OF ALLOWANCES TO TRUSTEES.

NOW that we have discussed the *duties* of trustees, and the extent of their *powers*, we may next enter upon a subject very closely interwoven with the execution of the office, viz., what allowances will be made to trustees for their Trouble, Actual expences, and Costs of suit.

I. It is an established rule in general, that a trustee shall have no allowance for his trouble and loss of time; the reason of which appears to be, that on these pretences, if admitted, the trust estate might be loaded, and rendered of little value, besides the great difficulty there would be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another. And there can be no hardship in this respect upon the trustee, for it lies in his own option whether he will accept the trust or not (a). Another ground is, that if the trustee were allowed to perform the duties of the office, and to claim

(a) *Robinson v. Pett*, 3 P. W. 58; *in re Ormsby*, 1 B. & B. 180, 251, *per* Lord Talbot; *Gould v. per* Lord Manners; *Charity Corp. Fleetwood*, cited *Ib.* note (A); *v. Sutton*, 2 Atk. 406, *per* Lord How *v. Godfrey*, Rep. t. Finch, Hardwicke; *Bonithon v. Hockmore*, 361; *Brocksopp v. Barnes*, 5 Mad. 1 Vern. 316; &c. 90; *Ayliffe v. Murray*, 2 Atk.

compensation for his services, his interest would be opposed to his duty; and, as a matter of prudence, the Court will not allow a trustee or executor to place himself in such a situation (*b*).

And the rule applies not only to trustees in the strict and proper sense of the word, but to all who are virtually invested with a fiduciary character, as executors and administrators (*c*), mortgagees (*d*), receivers (*e*), and committees of lunatics' estates (*f*).

But trustees for absentees of estates in the West Indies are allowed a commission for their personal care in the management and improvement of the property. But if, instead of remaining upon the island, they commit the management to the hands of agents, the Court will reject the claim; for it would be a strange construction that one allowed a commission on account of the proprietor's absence should insist upon his reward when he has been absent himself (*g*). But a manager, though he forfeits his *commission* during the period of his absence, will be repaid the sums actually disbursed by him for the care of the estate by others, provided the payments he has made be in themselves reasonable and proper (*h*).

The rate of commission has been regulated by several acts of Assembly: it was originally 10*l.* per cent. upon

(*b*) *New v. Jones*, Exch. Aug. 9, 1833, cited 9th Jarm. Prec. 338, per Lord Lyndhurst.

(*c*) *Scattergood v. Harrison*, Mos. 128; *How v. Godfrey*, Rep. t. Finch, 361; *Sheriff v. Axe*, 4 Russ. 33.

(*d*) *Bonithon v. Hockmore*, 1 Vern. 316; *Langstaffe v. Fenwick*, 10 Ves. 405; *French v.*

Baron, 2 Atk. 120; *Chambers v. Goldwin*, 9 Ves. 272, per Lord Eldon; *Carew v. Johnston*, 2 Sch. & Lef. 301; per Lord Redesdale.

(*e*) *In re Ormsby*, 1 B. & B. 189.

(*f*) *Anon. Case*, 10 Ves. 103.

(*g*) *Chambers v. Goldwin*, 5 Ves. 834; 9 Ves. 254, see 273.

(*h*) *Forrest v. Elwes*, 2 Mer. 68.

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and since 6l. per cent. (i).
signature was only that the
per cent., not that under par-
might not be a great deal less (k).
prohibited from charging any
that they may have themselves paid
to a factor (l).

who has been appointed in the East
administers in that country, and then returns
will, if called upon in a court of equity to
an account, be allowed a commission of five per
cent. upon the receipts or payments according to the
practice of the Indian courts. The appointment of an
executor in the East Indies is considered the appoint-
ment of an agent for the management of the estate.
Without such an allowance, where a person died in India
deprived of the presence of his relations, the effects of
the testator might often not be collected at all. Besides,
the executors in England could scarcely procure a person
to undertake the office at any cheaper rate (m).
An executor in India will only be allowed the com-
mission where the testator himself has not left him a
legacy for his trouble (n); but if the amount of the
legacy be an inadequate compensation for the duties of
the office, it seems the executor, so as he signify his
renunciation in proper time, may renounce the intended
legacy, and take advantage of the commission (o).

4 Ves. 72.

(n) *Freeman v. Fairlie*, 3 Mer.

24.

(o) See *Id.* 28.

Lord Aldley.

A person who has carried on a business with another man's money, and so is *constructively* a trustee, may, if compelled to account for the profits, be allowed a compensation for his skill and exertions in the management of the concern.

Thus, Brown and De Tastet were partners, and Brown died, and De Tastet carried on the business with Brown's money. A bill was filed by Brown's representative against De Tastet for an account, and Lord Eldon said, "it could not be denied, that if the business was such that on the death of the party other persons were concerned in aiding it by the application of their skill, their services, and their property, a great deal would be included under the head of just allowances, which, till the Master had thoroughly investigated the case, the Court could not determine;" and it was ordered, that upon the reference to the Master De Tastet should be at liberty to submit any claims to just allowances for his management of the business, the Master to certify upon what grounds he made the allowances should the plaintiff require it, or upon what grounds he refused to make the allowances if required by the defendant (*p*).

To this principle must be referred the early case of *Brown v. Litton* before Lord Harcourt (*q*). The captain of a ship, who had 800 dollars on board which he intended to invest in trade, died upon the voyage, and the mate, who succeeded to the command of the vessel, took the 800 dollars, and traded with them, and made great improvements. The executrix of the captain filed a bill for an account, and Lord Keeper Harcourt

(*p*) *Brown v. De Tastet*, Jac. 15 Ves. 225.
284; and see Sir Samuel Romilly's argument in *Crawshay v. Collins*, (q) 1 P. W. 140; S. C. 10 Mod. 20.

said, "the defendant was like a trustee, and was clearly liable to account for the profits. It resembled the case of two joint traders, where one died, and the survivor carried on the business, when the survivor should account for the profits he made to the representative of the deceased partner." And the Court observed, that "this country being an island, all imaginable encouragement ought to be given to trade; and it was a comfort to a man to know that if he should die on the passage, the improvement of his effects should be for the advantage of his family; but that, to recompense the defendant for his care in trading with the money, the Master should settle a proper salary for the pains and trouble he had been at in the management thereof."

But a person will not be allowed to charge anything for his management of a trade or business, where he has been clothed in express terms with the character of a trustee or executor (r).

A *solicitor* or *attorney* who sustains the character of trustee will not be permitted to charge for his time, trouble, or attendance, but only for his actual disbursements.

In *Ayliffe v. Murray* (s) Lord Hardwicke appears to have thought an attorney *might* make the usual professional charges; but the contrary has now been expressly decided by Lord Lyndhurst in the recent, and still unreported case of *New v. Jones* (t). His Lordship was of opinion that "the principle applied as strongly to the case of an attorney as to that of any other person. If

(r) *Burden v. Burden*, 1 V. & B. 170; *Brocksopp v. Barnes*, 5 Mad. 90. But see *Marshall v. Holloway*, 2 Sw. 432. (s) 2 Atk. 58, see 60. (t) Exch. Aug. 9, 1833, cited 9 Jarm. Prec. 338.

an attorney who was an executor performed business that was necessary to be transacted, he was not entitled to be repaid for those duties; for it would be placing his interest at variance with the duties he had to discharge. It was said, the bill might be taxed, and this would be a sufficient check; but he was of opinion that that would not be a sufficient check: the estate had a right not only to the protection of the taxing officer, but also to the vigilance and guardianship of the executor or trustee in addition to the check of the taxing officer. There might be cases where a trustee placed in the situation of a solicitor might, if he were allowed to perform the duties of a solicitor and to be paid for them, find it very often proper to institute and carry on legal proceedings, which he would not do if he were to derive no emolument from them himself, and if he were to employ another person. If a trustee, who was a solicitor, acted as a solicitor, he was not entitled to charge for his labour, but only for his costs out of pocket."

But the rule against allowances to trustees is merely a general one in the absence of express directions to the contrary; for there is no objection, if the settlor himself choose to compensate the trustee for his services either by the gift of a sum in gross, or by the allowance of a salary (u).

Thus, in *Webb v. The Earl of Shaftesbury* (x), an estate was devised to Arrowsmith and his heirs upon trust to set and manage, and out of the rents and profits to pay all rates and taxes, charges of repairs, stewards', bailiffs',

(u) *Robinson v. Pett*, 3 P. W. 250, per Sir J. Jekyll.

(x) 7 Ves. 480.

and gamekeepers' salaries, and all other expenses, and the commission thereafter mentioned, and subject thereunto upon certain trusts; and the testator directed that the trustee should retain for his trouble a commission of 5*l.* per cent. on the gross rental of the estates. The trustee claimed to be reimbursed all his expenses over and above his commission; and Lord Eldon said, "he felt a strong inclination to hold that this commission of 5*l.* per cent. was the whole the trustee was to have, but the will did not say so, and upon the will he must give him the other allowances."

Where the settlor has not declared his mind as to the *amount* of the remuneration, it will be referred to the Master to settle the *quantum meruit* according to the circumstances of the case (*y*).

The trustee may also contract for an allowance with his *cestui que trust*; but bargains of this kind are very suspicious, and are watched by the Court with an eye of extreme jealousy. The observations of Lord Hardwicke upon this subject are well worthy of attention. Two persons had been made executors and trustees, and one of them refused to act unless the *cestui que trust* would give them, besides their legacies, some consideration for their trouble. This the *cestui que trust* refused for some time to do, but at last consented to give 100*l.* to one and 200*l.* to the other. Lord Hardwicke said, "With regard to the question, whether upon general grounds a trustee may make an agreement with his *cestui que trust* for an extraordinary allowance over and above what he is allowed by the terms of the trust, I think there may

(*y*) *Ellison v. Airey*, 1 Ves. 111, see 115.

be cases where the Court would establish such agreements, but at the same time would be extremely cautious and wary in doing it. In general, the Court looks upon trusts as honorary, and a burden upon the honour and conscience of the person intrusted, and not undertaken upon mercenary views; and there is a strong reason too against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a *cestui que trust*; and therefore this Court has always held a strict hand over trustees in this particular. If a trustee comes in a fair and open manner, and tells the *cestui que trust* that he will not act in such a troublesome and burdensome office unless the *cestui que trust* will give him a further compensation, and it is contracted for between them, I will not say this Court will set it aside, though there is no instance where they have confirmed such a bargain. I consider the present case in this light:—Two trustees are making an ill use of an authority they had under the will to extort a reward from the *cestui que trust*. If they had told him, give us a further reward, or we will renounce, they had acted fairly, and something might be said in favour of the contract; but the personal estate was vested in them before probate, and could not be got out of them without an actual renunciation. The real estate was likewise vested in them, and could not be taken out of them but by an actual assignment; and, sensible of these difficulties upon the *cestui que trust*, the trustees and executors would not act in order to force him into their terms. Consider the ill consequences of such a case. Suppose it should be necessary that a will should be immediately proved, as in the case of a widow and children; shall a trustee, in whom the testator reposed a

trust and confidence, and depended upon his honour and kindness, insist upon such hard terms as to have an unreasonable reward before he will either prove the will or act in the trust?" It is almost unnecessary to add that the trustees were refused the advantage of their bargain (x).

Even where the contract is not void *ab initio*, the conditions of it must be fulfilled to the letter, or the trustee cannot claim his reward. An executor, who had no legacy, and where the execution of the trust was likely to be attended with trouble, agreed with the residuary legatees in consideration of 100 guineas to act in the executorship. He died before the execution of the trust was completed, and his executors brought a bill to be allowed those 100 guineas out of the trust money in their hands, but the Court said all bargains of this kind ought to be discouraged, as tending to eat up the trust, and here the executor had died before he had finished the affairs of the trust; and so the plaintiffs' demand was disallowed (a).

As the reason why bargains of this kind are so narrowly watched is because the trustee, by being in possession of the estate, has an advantage, in contracting, over the *cestui que trust*, if the trustee deal, not with the *cestui que trust*, but with the Court, he is at liberty, before accepting the trust, to stipulate for a reasonable remuneration (b).

In *Marshall v. Holloway* (c) Croft, one of three trustees, had declined to prove the will or enter upon the

(x) *Ayliffe v. Murray*, 2 Atk. note (A).

58.

(b) *Brocksopp v. Barnes*, 5 Mad.

(a) *Gould v. Fleetwood*, cited 90, per Sir J. Leach.

Robinson v. Pett, 3 P. W. 251, (c) 2 Sw. 432.

trusteeship, but had executed no disclaimer of the estate, and, as the person best acquainted with the testator's affairs, had been employed by his co-trustees in the capacity of agent. The co-trustees filed a bill for the administration of the trust, and prayed, *inter alia*, that, in case the Court should be of opinion that Croft ought to be discharged from the trust, then he might convey the trust estates, and be allowed a compensation for his time and trouble in the management of the testator's affairs. Lord Eldon decreed, that, "it being alleged by the co-trustees that the nature and circumstances of the testator's estate required the application of a great proportion of time, and that they could not undertake to continue in the trust without the aid and assistance of Croft, who was better acquainted therewith than any other person, and that it would be for the benefit of the estate that Croft should continue a trustee, and it being alleged by Croft that due attention to the affairs of the testator would require so much of his time and attention as would be greatly prejudicial to his other pursuits, and therefore he would not have undertaken to act therein, but under the assurance that an application would be made to the Court to authorize the allowance of a reasonable compensation for his labour and time, and that he could not continue to act therein without such reasonable allowance being made to him, it should therefore be referred to the Master to settle a reasonable allowance to be made to Croft for his time, pains, and trouble for the time past, and if the Master should be of opinion that Croft should be continued a trustee, then to settle a reasonable allowance to be made to Croft for his services in the time to come."

But a mortgagee cannot bargain for a compensation either with the *cestui que trust* or with the Court, for

an agreement of this kind would have a tendency to usury (*d*).

As a trustee will not be permitted to charge for his personal care and loss of time, it is but just he should be allowed on proper occasions to call in the assistance of *agents* at the expense of the estate. Thus a trustee or a mortgagee may, if the case require it, appoint a collector of rents (*e*). And as a man is not bound to be his own bailiff, if a trustee or mortgagee employ a skilful person in that capacity, the salary must be allowed (*f*); at least the Court will grant that indulgence where the estate is at such a distance from the mortgagee's residence, that he must have appointed a bailiff, had the estate been his own (*g*).

An executor employed a person who had been his clerk to transact some business for him relative to the testator's affairs, and the Master insisted it was the executor's own duty, and refused to allow the expense. But Lord Hardwicke said, "he was clear, that if an executor paid an attorney for his trouble and attendance in the management of the estate, he ought to be repaid the sums he had so disbursed," and ordered a reference to the Master to tax the items of the bill (*h*).

If the accounts be complicated, and the executor or trustee take upon himself to adjust and settle them, although it may occupy a great deal of his time and atten-

(*d*) See *Chambers v. Goldwin*, 9 Ves. 271; *Scott v. Brest*, 2 T. R. 238. (*f*) *Bonithon v. McMahon*, 1 Vern. 316; *Chambers v. Goldwin*, 9 Ves. 272, per Lord Eldon.

(*e*) *Davis v. Dendy*, 3 Mad. 170; *Stewart v. Hoare*, 2 B. C. C. 663; and see *Wilkinson v. Wilkin-*

son, 2 S. & S. 237. (*g*) *Godfrey v. Watson*, 3 Atk. 518, per Lord Hardwicke. (*h*) *Macnamara v. Jones*, 2 Dick. 587.

tion, the principle of equity is that he cannot claim a compensation; but if he choose to save his own trouble by the employment of an accomptant, he is entitled to charge the trust estate with it under the head of expenses (i).

The executor of a trader had employed an agent to collect debts at a commission of 5 per cent. The Master had reduced the commission to $2\frac{1}{2}$ per cent.; and, the executor upon that ground taking an exception to the report, Sir J. Leach said, "Executors, generally speaking, are not allowed to employ an agent to perform those duties which by accepting the office of executors they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them the expenses they have incurred in the employment of agents: I have some doubt whether in this case the Master ought to have made *any* allowance, but with the allowance of $2\frac{1}{2}$ per cent. the executor must be content (k)."

It was laid down by Lord Keeper Wright, but who had not then been long in the Court, that if one devised to trustees, and by an express clause gave them power to appoint agents to manage the land, and they appointed one then solvent and good, though afterwards he proved insolvent, they should not answer for him; but if there were no such direction or power in the will, the trustees were bound to answer for their agents at all events (l). But Lord Hardwicke laid down a rule, which is much more in harmony with the general principles of equity, that trus-

(i) *New v. Jones*, Exch., 9th 275.

August, 1833, cited 9 Jarm. Prec.
338; *Henderson v. M'Iver*, 3 Mad.

(k) *Weiss v. Dill*, 3 M. & K. 26.

(l) *Anon. case*, 12 Mod. 560.

tees should not be answerable for losses where they acted by other hands, either from *necessity* or *conformably to the common usage of mankind*. "There are," he said, "two sorts of necessity: first, legal necessity; and, secondly, moral necessity. As to the first a distinction prevails. Where two executors join in giving a discharge for money, and one of them only receives it, they are both answerable for it; because there is no necessity for both to join in the discharge, the receipt of either being sufficient: but if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary. Moral necessity is from the usage of mankind, if the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business; as if a trustee appoint rents to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable: so in the employment of stewards and agents; for none of these cases are on account of necessity, but because the persons acted in the usual method of business (*m*).” And Lord Loughborough in very similar terms observed, “If the business was transacted in the *ordinary* manner, unless there were some circumstance to create suspicion, surely the allowance is fair (*n*).”

And a trustee is not called upon to take security from his agent; for to do this on every occasion would tend greatly to the hindrance of business (*o*).

II. Though a trustee is allowed nothing for his *trouble*, he is allowed every thing for his *expenses out of pocket* (*p*).

(*m*) *Ex parte Belchier*, Amb. 220, per Lord Hardwicke.

219. (*p*) *How v. Godfrey*, Rep. 1.

(*n*) *Bacon v. Bacon*, 5 Ves. 335. Finch, 361; in *re Ormsby*, 1 B. &

(*o*) *Ex parte Belchier*, Amb. B. 190, per Lord Manners; *Hide*

"It flows," said Lord Eldon, "from the nature of the office, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust (*q*)."

If a trustee be sued concerning the trust, and have his costs paid him as between party and party, and the *cestui que trust* afterwards file a bill for an account, the trustee will be allowed his necessary costs in the former suit, and will not be concluded by the amount of the taxation (*r*); but of course a trustee will have no claim to reimbursement out of the trust fund, where the legal proceedings were occasioned by his own negligence in the first instance (*s*).

Even a specific remuneration given by the testator to his trustees for their services in the trust is no reason for excluding them from the usual allowance for *expenses*. A testator bequeathed to his acting trustees for the time being the yearly sum of five guineas a-piece for the care and trouble they might have in the execution of the trust. The testator's estates consisted in part of about 50 houses in London, 34 of which were let to weekly tenants. The trustees employed a person to collect the rents, and Sir John Leach said, "The annuity was given to them as a recompence for the care and trouble which would attend the due execution of the office; and if it was consistent with the due execution of the office to employ a collector, they were entitled to the annuity. A

v. *Haywood*, 2 Atk. 126; *Caffrey* Ves. 254, per Lord Eldon.

v. *Darby*, 6 Ves. 497, per Sir W. Grant; *Godfrey v. Watson*, 3 Atk. 518, per Lord Hardwicke. (*r*) *Amand v. Bradburne*, 2 Ch. Ca. 138; *Ramsden v. Langley*, 2 Vern. 536; and see *Fearn v. Young*, 10 Ves. 184.

(*q*) *Worrall v. Harford*, 8 Ves. 8; and see *Dawson v. Clarke*, 18 (*s*) *Caffrey v. Darby*, 6 Ves. 497.

provident owner might well employ a collector in such a case, and the labour of such a collection could not be imposed on the trustee (*t*)."

A regular account of the expenses should invariably be kept ; but where this has not been done the Court has ordered a reasonable allowance to be made in the gross, at the same time taking care that the remissness and negligence of the trustee in not having kept any account does not meet with any encouragement. Thus in *Hethersell v. Hales* (*u*) the trustee put in a general claim for 2,500*l.*, apparently an average estimate of the expenses he had incurred in the trust. "The Court," says the reporter, "took some time to deliberate what was fit to be allowed in a matter of this nature ; and having considered that the trustee was a friend to the family, and undertook the trust at their great importunity, and that he had incurred the charge of surveying the whole estate, selling and letting the same, looking after tenants, adjusting their accounts, calling in their rents, returning monies to creditors, and treating with and stating their debts, and procuring and agreeing with purchasers, and for law charges, and for keeping servants and horses, and employing others in journeys to London and elsewhere, and his care there lying from home a long time, the Court was of opinion that the trustee might well deserve the whole 2,500*l.*, yet would not allow but 2,000*l.*, which the trustee was to have."

As it is a rule that the *cestui que trust* ought to save the trustee harmless from all damages relating to the trust, so within the reason of the rule, where the trustee has

(*t*) *Wilkinson v. Wilkinson*, 2 *Earl of Shaftesbury*, 7 Ves. 480. S. & S. 237; and see *Webb v.* (*u*) 2 Ch. Rep. 158.

honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from a loss, or from a plain and great hazard of it, the trustee ought to be repaid (*x*).

The expenses incurred by a trustee in the execution of his office are treated by the Court as a charge or *lien* upon the estate, and the *cestui que trust* or his assign cannot compel a conveyance in equity without a previous satisfaction of all the trustee's demands.

In *Trott v. Dawson* (*y*) Lord Macclesfield said, “ Dawson, the assignee of Archdale, cannot be in a better case than Archdale under whom he claims. Wherefore, as Archdale would not have had the assistance of a Court of Equity without paying for the charge and trouble which Trott had been at in relation to the trust, so, by parity of reason, the defendant Dawson, as claiming under Archdale, must do the same thing which it was incumbent upon Archdale to have done.

The decision in this case was reversed in the House of Lords; and hence the inference has been drawn, that a trustee gives credit for the expenses, not to the *estate*, but to the *person* of the *cestui que trust*, and that the assign is not liable for the trustee's expenses incurred in the time of the assignor. The case is reported much more at length in Brown (*z*), and the circumstances were briefly these:—An eighth of the proprietorship of the province of Carolina had been conveyed in 1684 to Amy in trust for four persons. The whole equitable interest had become subsequently vested in John Archdale, who settled it upon Dawson and his

(*x*) *Balsh v. Hyham*, 2 P. W. 455, *per* Lord King.

(*y*) 1 P. W. 780.

(*z*) 7 B. P. C. 266.

wife. Dawson filed a bill against the co-heirs of Amy for a conveyance ; and the question between the parties was, whether the expenses incurred by Amy ought or ought not to be first paid and satisfied. On a reference to the Master it was found that Amy had been active in the trust from 1684 to 1697, and during that time had expended various sums of money ; that the proprietors of the province had ordered Amy one grant of 12,000 acres ; had created him Landgrave, with a further grant of 48,000 acres ; and had also presented him with one of the eight proprietorships, which had fallen in by the death of a proprietor without heirs. It was entered on the books of the proprietors in 1698, that the grants had been made to Amy for his services generally, and *particularly for his faithful discharge of the trust* ; that Amy had agreed to convey the estate on request to W. J., who was to succeed him in the office, and by whom subsequently the trust was exclusively managed. It did not appear that the first two grants had ever been perfected, or had become beneficial ; but the grant of the proprietorship had been accepted and acted upon. It was under these circumstances that Lord Macclesfield directed a conveyance of the estate, subject to the payment of Amy's expenses ; but on appeal to the House of Lords the decree below was reversed. The question therefore appears to have been, not whether Amy's expenses, due from the assignor, were to be regarded as a lien upon the estate, but whether the grants made to Amy had not been accepted by him as a full compensation.

But although the trustees themselves are creditors upon the trust fund for the amount of their expenses, the persons who are employed by them as solicitors, sur-

veyors, &c., have no such lien, except, it may be, in some special case (*a*); and the law is so settled, notwithstanding an express declaration by the settlor that the trustee shall *in the first place pay the expenses of the trust*, and though the trustees themselves be charged to be insolvent: in every deed is *implied* a direction to pay the costs and expenses, and *expressio eorum quæ tacite insunt nihil operatur*: it would be a mischievous principle to hold, that every person with whom the trustees had incurred a just and fair demand might sue the trustees, and come for an account of the whole administration (*b*). And, *vice versâ*, the agents of the trustees are accountable to their employers only, the trustees, and not to the *cestuis que trust* (*c*); unless they have not confined themselves to the duties of agents, but by accepting a delegation of the whole trust have themselves become trustees by construction of law (*d*).

If the trust estate fail, it seems the trustees may then file a bill against the *cestui que trust* to recover from him personally the amount of the money expended (*e*).

III. It remains to consider the subject of the costs of trustees incurred in legal proceedings.

1. The general rule is, that a trustee or executor shall have his costs, though not his costs *charges and expenses* (*f*), awarded him at the hearing out of the trust

(*a*) *Lawless v. Shaw*, L. & G. 154.

(*b*) *Worrall v. Harford*, 8 Ves. 4, see 8.

(*c*) *Myler v. Fitzpatrick*, 6 Mad. 60, *per* Sir J. Leach; but see *Pollard v. Downes*, 1 Eq. Ca. Ab. 6.

(*d*) *Myler v. Fitzpatrick*, *ubi supra*; and see *Pollard v. Downes*, *ubi supra*.

(*e*) *Balsh v. Hyham*, 2 P. W. 453.

(*f*) *Brooke v. Turner*, V. C. March 7th, 1836, MS.

estate (*g*). And if there be a fund under the control of the Court, but *not otherwise* (*h*), he will have his costs as between solicitor and client (*i*). But the executor or trustee will not be allowed without question whatever sum by way of costs he thinks fit himself to pay his solicitor; for, the bill, though not submitted to a regular taxation, will be moderated in the Master's office by a deduction of such charges as may appear irregular and excessive (*j*).

Even where the trustee did not appear at the hearing, and a decree *nisi* was made against him, and the trustee set down the cause again, and prayed to have his costs of the suit upon his paying the costs of the day, Lord Kenyon said, "The payment of the costs of the day makes the trustee *rectum in curia*; and as he would most unquestionably have been entitled to his costs if he had appeared at the original hearing, so he now stands in the same situation, and is therefore entitled to his costs (*k*)."

But if the decree has been *passed*, a trustee who has omitted to ask for his costs at the hearing cannot have the cause reheard upon the subject of costs only, and cannot obtain an order for payment of his costs upon presenting a petition (*l*).

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| (<i>g</i>) 1 Eq. Ca. Ab. 125 note (<i>a</i>); | 389; <i>Taylor v. Glanville</i> , 3 Mad. |
| <i>Hall v. Hallet</i> , 1 Cox, 141, <i>per</i> | 176; &c. |
| Lord Thurlow; <i>Attorney-General</i> | (<i>h</i>) <i>Edenborough v. The Arch-</i> |
| <i>v. City of London</i> , 3 B. C. C. 171; | <i>bishop of Canterbury</i> , 2 Russ. 112. |
| <i>Norris v. Norris</i> , 1 Cox, 183; | (<i>i</i>) <i>Mohun v. Mohun</i> , 1 Sw. |
| <i>Sammes v. Rickman</i> , 2 Ves. jun. | 201, <i>per</i> Sir T. Plumer. |
| 38, <i>per</i> Lord Chief Baron Eyre; | (<i>j</i>) <i>Johnson v. Telford</i> , 3 Russ. |
| <i>Rashley v. Masters</i> , 1 Ves. jun. | 477. |
| 201; <i>Rocke v. Hart</i> , 11 Ves. 58; | (<i>k</i>) <i>Norris v. Norris</i> , 1 Cox, 183. |
| <i>Maplett v. Pocock</i> , Rep. t. Finch, | (<i>l</i>) <i>Colman v. Sarell</i> , 2 Cox, |
| 136; <i>Landen v. Green</i> , Barn. | 206. |

If a person named as trustee be made defendant to a suit, and by his answer disclaim the trust, the bill will be dismissed as against him with *costs*, but not with *costs as between solicitor and client*; for, having refused to accept the office, he stands in the light of any ordinary defendant (*m*).

In the case of two or more trustees, each of them may employ a separate solicitor, and put in a separate answer, and will each have his costs; for, as they are separately responsible, they cannot be obliged to repose confidence in the same person (*n*).

2. If any particular instance of misconduct, or a general dereliction of duty in the trustee (*o*), or even his mere caprice and obstinacy (*p*), be the immediate cause why the suit was instituted, the trustee, on the charge being substantiated against him, must pay the costs of the proceedings his own improper behaviour has occasioned. And where two executors had kept large balances in their hands for a great length of time, and one

(*m*) *Norway v. Norway*, 2 M. & K. 278, overruling *Sherratt v. Bentley*, 1 R. & M. 655.

(*n*) See *Reade v. Sparkes*, 1 Moll. 10.

(*o*) *Attorney-General v. Hobert*, Rep. t. Finch, 259; *Earl Powlet v. Herbert*, 1 Ves. jun. 297; *Cafrey v. Darby*, 6 Ves. 488; *Littlehales v. Gascoyne*, 3 B. C. C. 73; *Ashburnham v. Thompson*, 13 Ves. 402; *Hide v. Haywood*, 2 Atk. 126; *Adams v. Clifton*, 1 Russ. 297; *Mosley v. Ward*, 11 Ves. 581; *Piety v. Stace*, 4 Ves. 620; *Seers v. Hind*, 1 Ves. jun. 294;

Fell v. Lutwidge, Barn. 319, see 322; *Brown v. How*, Barn. 354, see 358; *Sheppard v. Smith*, 2 B. P. C. 372; *Haberdashers' Company v. Attorney-General*, 2 B. P. C. 370; *Franklin v. Frith*, 3 B. C. C. 433; *Whistler v. Newman*, 4 Ves. 129; *Stacpoole v. Stacpoole*, 4 Dow. 209; *Crackelt v. Bethune*, 1 J. & W. 586.

(*p*) *Taylor v. Glanville*, 3 Mad. 178, per Sir J. Leach; *Jones v. Lewis*, 1 Cox, 199; *Earl of Scarborough v. Parker*, 1 Ves. jun. 267.

of them had become insolvent, the Court decreed *each* of them to be liable for the costs of the *whole* suit (*q*).

But where a bill was filed charging the trustee with a breach of trust both as to realty and personalty, and the charge failed as to the former but succeeded as to the latter, the Court said, it was scarcely possible to suppose that the trustee should be permitted to *have* his costs, but it would be injustice to make him *pay the whole costs*, as one part of the bill had failed (*r*).

Trustees for sale had purchased in the name of a trustee at an under value, but *without any imputation of fraud, and by auction*. As to so much of the suit as related to calling upon the trustees to submit to a resale, and the directions consequential thereon, the Court gave relief against the trustees *with costs*; but, as to the accounts that must have been taken had the sale been unimpeachable, the trustees were allowed their costs (*s*).

If the suit was occasioned by the *mistake*, or some *slight neglect* of the trustee, the Court will content itself with *not giving* him costs (*t*), or will punish him with *payment of part* of the costs only (*u*), or will even *give* him his costs (*x*).

3. If the bill filed did not originate from any necessity of inquiring into the conduct of the trustee, but in the

(*q*) *Littlehales v. Gascoyne*, 3 Ves. 117.

B. C. C. 73.

(*u*) *East v. Ryal*, 2 P. W. 284.

(*r*) *Pocock v. Reddington*, 5 Ves.

(*x*) *Taylor v. Tabrum*, 6 Sim.

800.

281; *Flanagan v. Nolan*, 1 Moll.

(*s*) *Sanderson v. Walker*, 13 Ves.

84; *Travers v. Townsend*, ib.

601.

496.

(*t*) *O'Callaghan v. Cooper*, 5

course of the proceedings instituted upon other grounds it appears the trustee has in some particular instance been guilty of a breach of trust, the Court will not award against the trustee the costs of the *whole* cause, but only of so much of it as connects itself with his misconduct, and as to the rest of the suit will allow him his costs (*y*).

An executor, instead of accumulating a fund as directed by the will, had improperly kept the balance in his hands; but, as the amount of costs had in great measure been occasioned by the inquiry what rule the Court ought to adopt with respect to the computation of interest, it was thought hard under the circumstances to fix the executor with payment of costs even relatively to the breach of trust; and therefore the Court gave no costs (*z*).

As to one part of the suit, the trustee ought from his misconduct to have *paid* the costs, and, as to another, to have been *allowed* his costs; and the Court, by a kind of compromise, left each party to pay his own costs (*a*).

Where the breach of trust is very trivial, the Court may overlook it altogether, and give the trustee his whole costs (*b*).

4. If a trustee have a private interest of his own separate and independent from the trust, and oblige the *cestui que trust* to come into a court of equity merely to have some point relating to the trustee's private interest determined at the expense of the trust, that is such a

(*y*) *Tebbs v. Carpenter*, 1 Mad. 290, see 308; *Newton v. Bennet*, 1 B. C. C. 359.

(*a*) *Newton v. Bennet*, 1 B. C. C. 362.

(*b*) *Fitzgerald v. Pringle*, 2 Moll. 534.

(*z*) *Raphael v. Boehm*, 13 Ves. 592.

vexatious proceeding in the trustee, that, for example's sake, he will be decreed to pay the costs of the whole suit (*c*).

5. If on a bill for an account the defendant says in his answer he believes the plaintiff is considerably indebted to him, and after a long investigation it proves the defendant is considerably indebted to the plaintiff, the trustee, thus daring the plaintiff to the account, will be decreed to pay the costs (*d*). And if the balance be in favour of the trustee, but far below what he had stated in his answer, he will not be entitled to *have* his costs (*e*).

A trustee will be fixed with costs if he wilfully misstate the accounts (*f*), or if, by any chicanery in his answer, he keep the *cestui que trust* from a true knowledge of the accounts (*g*), or even if he have kept the accounts in a very confused manner (*h*). And an executor will be liable to the costs if he deny assets, and the contrary be established against him (*i*).

Where a corporation in their answer pleaded ignorance of the claims of the plaintiff, and the information was afterwards elicited from the documents scheduled to their answer, as the Court inferred from such conduct a disposition to obstruct and defeat the ends of justice, the corporation was decreed to pay the costs of the suit (*k*).

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| (<i>c</i>) <i>Henley v. Philips</i> , 2 Atk. 48. | (<i>g</i>) <i>Avery v. Osborne</i> , Barn. |
| (<i>d</i>) <i>Parrot v. Treby</i> , Pr. Ch. 349. | |
| 254. | (<i>h</i>) <i>Norbury v. Calbeck</i> , 2 Moll. |
| (<i>e</i>) <i>Attorney-General v. Brewers' Company</i> , 1 P. W. 376. | 461. |
| (<i>f</i>) <i>Sheppard v. Smith</i> , 2 B.P.C. 372; and see <i>Flanagan v. Nolan</i> , | (<i>i</i>) <i>Sandys v. Watson</i> , 2 Atk. 80. |
| 1 Moll. 86. | (<i>k</i>) <i>Attorney-General v. East Retford</i> , 2 M. & K. 35. |

And a corporation was punished in the same manner where, the Court having directed the production of certain documents, it was afterwards discovered a very material one had been suppressed (*l*).

6. The costs of the suit will be cast upon the trustee, if, in his answer, he set up a title of his own, and make an ill defence (*m*); and he will not be allowed to *have* his costs if he set up any trust different from what it actually is (*n*).

An executor sued by the next of kin had put the plaintiffs to the proof of their relationship, and, the fact not admitting a doubt, the executor was fixed with the costs of the inquiry (*o*).

7. It was laid down as a rule by Lord Thurlow, that "where he was obliged to *give interest against executors* as a remedy for a breach of trust, costs against them must follow of course (*p*);" but Sir W. Grant said, "that was a proposition to which he was not quite prepared to accede, as there might be many cases in which executors must pay interest, which would not be cases for costs (*q*);" and the existence of any such rule has since been denied by Sir T. Plumer (*r*). The meaning of Lord Thurlow probably was, that where the suit was occasioned by the misconduct of the trustee, and the charge against him was shown to be well founded by the Court's fixing him with interest, the costs of the

(*l*) *Borough of Hertford v. Poor* (*p*) *Seers v. Hind*, 1 Ves. jun. of same Borough, 2 B. P. C. 377. 294; and see *Franklin v. Frith*,

(*m*) *Loyd v. Spillet*, 3 P. W. 3 B. C. C. 433.

344. (*q*) *Ashburnham v. Thompson*,

(*n*) *Ball v. Montgomery*, 2 Ves. 13 Ves. 404.

jun. 191, see 199. (*r*) *Tebbs v. Carpenter*, 1 Mad.

(*o*) *Lowson v. Copeland*, 2 308.

B. C. C. 156.

suit in that case would be consequential upon the relief (s).

The preceding remarks apply only *as between the trustee and the parties interested in the trust estate*; but in cases where *strangers* are concerned the trustee is on no better footing than any ordinary plaintiff or defendant: the circumstance of the trust cannot be allowed to affect the interest of a *third* person (t).

Thus on a bill by a stranger for specific performance of a contract the vendor, a trustee for sale, must, if he cannot make a title, pay the costs of the suit agreeably to the general rule (u).

So where trustees or executors are brought before the Court as necessary parties by a stranger, if the trustees or executors contest the claims of the plaintiff, and the plaintiff recover in the suit, they are not entitled to their costs; but if they submit the point to the Court, they will be decreed their costs (x).

If a plaintiff *fail* in his suit, but stands in so hard a case that he ought not to *pay* any costs, the Court will not oblige him to pay the costs of a defendant who happens to *sustain* the character of trustee (y).

Where the bill of a stranger is dismissed with costs, a trustee, who is defendant, will not, as is usual between trustee and *cestui que trust*, be ordered his costs as between attorney and client, but only as between party and party (z).

(s) See *Mosley v. Ward*, 11 Ves. 582.

(t) *Burgess v. Wheate*, 1 Ed. 251, *per* Lord Northington.

(u) *Edwards v. Harvey*, Coop. 40; and see *Hill v. Magan*, 2 Moll. 460.

(x) *Rashley v. Masters*, 1 Ves. jun. 201, see 205.

(y) *Brodie v. St. Paul*, ib. 326, see 334.

(z) *Mohun v. Mohun*, 1 Sw. 201.

If a creditor file a bill against an executor for payment of a debt, the rule which prevails at *law* is not also the rule of *equity*, viz., that if the creditor recover he shall be entitled to his costs *de bonis testatoris*, and if there be none, then *de bonis propriis* of the executor ; for the consideration of costs in equity rests entirely in the discretion of the Court (*a*). If the assets be not sufficient to cover both the debt and the costs, the executor will not be decreed to *pay* costs (*b*), unless he have misconducted himself by having satisfied simple contract debts in preference to debts upon specialty (*c*). But of course the executor, where the debt has been allowed, will not be entitled to have his costs paid him by the creditor.

If the trustee or executor be not paid his costs, or not his full costs as against a stranger, the trustee may charge his costs, as between attorney and client, upon the trust fund (*d*), or the executor may retain them out of the residue of the assets (*e*). If there be no trust fund or assets, the trustee or executor must submit to the personal loss (*f*). And if a bill be filed by a specialty creditor, and the specialty exhaust the personal assets, the executor cannot claim to be reimbursed out of the real estate to the prejudice of the testator's heir (*g*) : the executor should have considered the risk before he applied for the probate (*h*).

(*a*) *Twisleton v. Thelwel*, Hard. 165 ; *Uvedale v. Uvedale*, 3 Atk. 119.

(*b*) *Twisleton v. Thelwell*, *ubi supra* ; *Morony v. Vincent*, 2 Moll. 461.

(*c*) *Jefferies v. Harrison*, 1 Atk. 468.

(*d*) See *supra*, p. 451 ; and see *Hill v. Magan*, 2 Moll. 460.

(*e*) *Uvedale v. Uvedale*, 3 Atk. 119 ; *Sandys v. Watson*, 2 Atk. 80.

(*f*) See *Mohun v. Mohun*, 1 Sw. 201 ; *Adair v. Shaw*, 1 Sch. & Lef. 280.

(*g*) *Uvedale v. Uvedale*, 3 Atk. 119.

(*h*) See *Ib.* ; *Humphrey v. Morse*, 2 Atk. 408.

CHAPTER XXIII.

HOW A TRUSTEE MAY OBTAIN HIS DISCHARGE FROM THE
OFFICE.

WE shall conclude the subject of the office of trustee by considering in what manner he may divest himself of that character.

The only modes by which he can accomplish this object appear to be the following :—either, first, He may have the universal consent of all the parties interested ; or, secondly, He may retire under cover of a special power contained in the instrument creating the trust ; or, thirdly, He may obtain his release by application to a Court of Equity.

I. As no *cestui que trust* who concurs in a breach of duty by the trustee can afterwards call him to account for the mischievous consequences of the act, it follows, that, where *all* the *cestuis que trust* lend their joint sanction to the trustee's dismissal, they are precluded from ever visiting him with damages on the ground of delegation of his office (*a*).

But the trustee must first satisfy himself that *all* the *cestuis que trust* are parties, for even in the case of a numerous body of creditors the consent of the majority is no estoppel as against the rest (*b*).

(*a*) *Wilkinson v. Parry*, 4 Russ. 276, *per* Sir J. Leach.

(*b*) See *supra*, 391, note (*x*).

And the *cestuis que trust* who join must of course be *sui juris*, not *femes covert* or infants, who have no legal capacity to consent.

If the parties interested in the trust fund be not all in existence, as where the limitation of the property is to children unborn, it is clear, that, as the trustee cannot have the sanction of all the parties interested, he cannot with safety obtain his discharge from the office.

II. A trustee may retire under cover of a special power contained in the original instrument.

The person who creates the trust may mould it in whatever form he pleases, and may therefore provide that on the occurrence of certain events and the fulfilment of certain conditions the original trustee may retire, and a new trustee be substituted.

The proviso usually introduced in settlements is that in case any trustee shall happen to die, or be *desirous of being discharged from*, or refuse or decline, or become incapable to act in the trusts, it shall be lawful for the *cestui que trust* to whom the power may be given, or, as the proviso is frequently worded, for the surviving or continuing trustee or the executors or administrators of the survivor, by deed attested by two witnesses to nominate some other person to be a trustee, and the power then proceeds to declare that the trust estate shall forthwith be vested jointly in the persons who are in future to compose the trust, and that the new or substituted trustee shall be capable of exercising all the same powers as if he had been originally named.

The construction of this proviso is, that the person to be appointed is not invested with the character of trustee until he has both been nominated to the office by the

donee of the power, and the trust property has been duly conveyed or assigned (c).

Should the trust estate consist of money in the funds, the stock may be transferred into the joint names of the old and the intended new trustee, and then by one and the same deed the donee of the power may nominate the new trustee, and the old and new trustee may execute a declaration of trust. If the trust estate consist of chattels real, or other chattels personal than stock, the parties cannot effectuate their object but at the trouble and expense of two deeds. By the first, the old trustee will assign the chattel interest to A., and then A., by indorsement, will reassign it to the old and new trustee as joint tenants. If the trust estate be of a freehold nature, there needs in general no other machinery than a simple conveyance under the statute of uses; for the old trustee may release the lands to the joint use of himself and the new trustee, and the statute will operate to transfer the possession. But in settlements which invest the trustees with powers the established form of the proviso has introduced the necessity of resorting to the use of two deeds. The language of the clause is, that "the trust estate, the trustee whereof shall so die, &c., shall be conveyed in such manner that the same may be vested in the old and new trustee to the uses, trusts, intents, and purposes of the settlement." Now, the meaning obviously is, that, as by the settlement an estate to preserve contingent remainders, or, it may be, some other interest, was limited to the trustees who are armed with the powers, should either of the trustees die, &c., and a

(c) *Foley v. Wontner*, 2 Jac. & Walk. 248, per Lord Eldon; and see *Wilkinson v. Parry*, 4 Russ. 272.

new trustee be appointed, such estate *pur autre vie*, or other interest, should be transferred to the old and new trustee jointly. But the practitioner, *ex majori cautela*, has attached to the words the possible, however improbable construction, that on the appointment of a new trustee the whole settlement should be re-opened, and that the fee simple should *ab integro* be conveyed to the old and new trustee to all the same uses, &c. as were declared by the original deed. For accomplishing this object it is necessary that two instruments should be prepared. By the first, the new trustee will be nominated by the donee of the power, the old uses of the settlement will be absolutely revoked, (the proviso, it is said, implying an authority for that purpose,) and the use will be appointed to A. and his heirs; and the estate and interest vested in the old trustee will be assured unto and to the use of A. and his heirs by way of conveyance. When this has been perfected by one deed, and A. has become seised, or is supposed to have become seised, of the inheritance in fee simple, he may then by lease and release, which may be indorsed on the former release, reconvey the premises to the old and new trustee to the uses, trusts, &c. of the settlement in the same manner as if the new trustee had been originally appointed. Some qualifications may also be requisite according to the circumstances of the case; as, if a term was limited by the settlement to two trustees, who are dead, and the term has become vested in the survivor's executor, words must be introduced that will effectually limit the term to the use of such executor. Thus, if the real intention was, that on the appointment of a new trustee a seisin to serve the uses should be vested in the old and new trustee jointly, then a power of revocation was implied, and the direction has been complied with.

If the settlor had no such intention, then there was no implied power of revocation, and the affected exercise of it is a nullity, and the conveyance *by* the old trustee, and the reconveyance *to* the old and new trustee, has served only to pass the actual and vested interest.

As this power must be governed by the same rules of construction as powers are in general, it must of course be carefully ascertained by the trustee, that the circumstances under which he retires from the trust are precisely those which the settlor contemplated in the terms of the proviso; for if the case be not warranted by the power, the trustee who resigns will be made responsible for all the mischievous consequences, just as if he had delegated the office. It may also be added, that the trustee who is informally substituted will not be capable of exercising the special powers with which the successor in the trust was intended by the settlement to be invested.

It is somewhat surprising, considering the frequency of this power, how few determinations have been resolved upon the subject.

In *Sharp v. Sharp* (*d*), heard in the Court of King's Bench, the terms in which the power was expressed were as follows:—"In case *either* of the trustees the said A. and B. shall happen to die, or desire to be discharged from, or neglect, or refuse, or become incapable to act in, the trusts, it shall be lawful for the *survivors or survivor* of the trustees so *acting* in the trusts, or the executors or administrators of the last surviving trustee, by any writing, &c., to nominate a new trustee." Neither of the trustees being willing to act in the trust, they executed a *conveyance* to two other persons intended to be

(*d*) 2 B. & A. 405.

new trustees; and the question was raised whether the power of appointment had, under the circumstances, been effectually exercised, and it was determined in the negative. Lord Tenterden said, "By the word 'survivor' I understand merely the trustee 'continuing to act;' for it seems to have been throughout the intention of the testator that, in case of the death or incapacity or refusal of some one of the trustees, the remaining trustee who had been named by him, and who had been the object of his confidence, should have the power of associating with himself some other person in the execution of the trust: but it would be giving a much larger construction to these words than they fairly import if we were to say, that the trustees in the event of the whole class declining to act might nominate such other persons as they might think fit to perform their duties." Mr. Justice Bayley observed, "The word 'either' is not uselessly introduced: it is in effect a proviso that if *either* of the trustees named in the will should refuse to act, still that the testator should have the benefit of the judgment of the other, who would act in concurrence with such other individual as he might nominate. The testator may have had good reason for confining the power to the care of one trustee, for he may have had special confidence in the trustees named by himself, and so long as *either* of those persons acted in the trust he might think his property safe. But if we were to read these words as if they were 'both or either,' the case would be different. If both the persons should decline to act, a testator might naturally object to their delegating their trust to other persons, and might then have thought it better that his property should be left to the care of a court of equity. And I apprehend that under

the words of this power the testator meant by the word 'acting' to designate those who had taken upon themselves to perform some of the trusts mentioned in the will, and that he did not contemplate one who *in limine* refused to act. And it seems to me, that a person who does so refuse cannot be considered as acting in any of the trusts. Then the word 'survivor' must mean the 'continuing' trustee, as contradistinguished both from those who might refuse to act and those who might be desirous to discontinue acting."

In *Morris v. Preston* (e) the proviso was, that "in case of the death of any or either of the two trustees during the lives of the husband and wife or the life of the survivor, the husband and wife or the survivor should, *with the consent of the surviving co-trustee or co-trustees*, nominate and appoint a new trustee or trustees, and that upon such nomination or appointment the *surviving co-trustee* should convey and assign the trust estates in such manner as that the *surviving trustee and trustees*, and such person or persons so to be nominated and appointed, should be jointly interested in the said trusts in the same manner as such *surviving trustee* and the person so dying would have been in case he were living." Both the trustees died, and the wife, who survived her husband, executed an appointment of two new trustees in the place of the deceased trustees. A purchaser took the objection, that, as the proviso clearly contemplated the case of *one* trustee surviving, an appointment of new trustees after the decease of *both* the original trustees was not warranted by the power. It was apparently a point of considerable doubt, yet the purchaser aban-

(e) 7 Ves. 547.

doned the objection at the hearing without argument—a circumstance much to be regretted, as a judgment from Lord Eldon would have thrown great light upon the subject.

If there be two trustees of a settlement, and both be anxious to retire from the trust at one, and the same time, they would not be justified in putting the property under the control of a single trustee appointed in their joint places (*f*).

And, *vice versa*, a single trustee, should he wish to retire, would do well to substitute a single trustee in his place (*g*); for though, in the substitution of more trustees than one, he would be chargeable rather with too much than too little caution, yet, as he ought not to clog the estate with any unnecessary machinery, the Court might possibly consider the act not to have been warranted by the words of the power.

Should one of two trustees be desirous of retiring, the power of appointment of new trustees would not authorize the appointment of the continuing trustee as *sole* administrator of the trust (*h*): this would, in effect, amount to a relinquishment of the trust without the appointment of any successor at all (*i*).

The proviso is sometimes of such a directory character as to authorize the appointment of new trustees upon one event, without the intention of confining the exercise of the power to the occurrence of that event exclusively. Thus, where six trustees were empowered,

(*f*) *Hulme v. Hulme*, 2 M. & K. 682.

(*g*) See *Devey v. Peace*, Taml. 77; but see *Sands v. Nugee*, July 5th, 1836. V. C. Appendix, No. 3.

(*h*) *Wilkinson v. Parry*, 4 Russ. 272.

(*i*) *Attorney-General v. Pearson*, 3 Mer. 412. *per* Lord Eldon.

when reduced to three, to fill up the number, and all died but one, it was held competent to the survivor to execute the appointment (*k*). So, where the original number of trustees was twenty-five, and they were directed, *when reduced to fifteen*, to proceed to nominate others, it was determined that, when seventeen remained, the survivors *might* elect, but when reduced to only fifteen they were *compellable* to elect (*l*).

Advantage cannot be taken of the power for the purposes of fraud; and therefore if a trustee refuse, when solicited, to commit a breach of duty himself, but declare his willingness to resign in favour of some other person less scrupulous, the Court, it is submitted, acting upon the principle *qui facit per alium facit per se* would hold the trustee who retires responsible for the misbehaviour of the trustee he has substituted. And a bond of indemnity given to the retiring trustee would be a very doubtful security against the consequences of the act; for the bond itself being infected with fraud could scarcely be put in suit, and recovered upon in a court of law.

III. The trustee may at any time get himself discharged from the office by application to a court of equity. A power of appointment of new trustees is very frequently omitted in settlements, and were there no means by which a trustee could ever denude himself of that character, it would operate as a great discouragement to mankind to undertake so arduous a task. And of course, where no misbehaviour is imputable to the trustee who

(*k*) *Attorney-General v. Floyer*, 5 Ves. 825; but see *Foley v. 2 Vern. 748*; and see *Attorney-General v. Bishop of Litchfield*, *Wontner*, 2 Jac. & Walk. 245.
(*l*) *Doe v. Roe*, 1 Anst. 86.

retires, the costs of the application will be thrown upon the trust fund.

The application must in general be made by *bill*, in order to give the Court an opportunity of examining into the merits of the case (*m*): but if a suit be already pending, the trustee may then solicit his dismissal by petition or motion (*n*); but as it is not the custom of the Court to look through the proceedings, a reference will be ordered to the Master to ascertain whether, under the circumstances, the trustee is in any wise accountable, and if not, then to settle a release (*o*).

It is very commonly, but erroneously, supposed, that by a clause in Sir Edward Sugden's Trustee Act (*p*) a new trustee may in all cases be appointed by the summary process of a petition. However, the words of the enactment do not authorize a petition for the *mere* purpose of appointment of new trustees, but only *where application is made under the act for a conveyance or transfer which could not otherwise be obtained* (*q*), and *the recent creation of the trust or other circumstances render it safe* (*r*): the Court is enabled to appoint new trustees by way of secondary or collateral, not of original jurisdiction.

The framer of the act will probably be considered its best interpreter:—"Before the Court," observed Sir Edward Sugden, "has jurisdiction under the twenty-second section, there must be a case where the party

(*m*) See *ex parte Anderson*, 5 Ves. 243; *in re Fitzgerald*, Lloyd & Goold, 22; *in re Anderson*, Id. 29.

(*n*) — *v. Osborne*, 6 Ves. 455; — *v. Robarts*, 1 J. & W. 251.

(*o*) — *v. Osborne*, *ubi supra*.

(*p*) 11 G.4. & 1 W.4, c. 60, s. 22.

(*q*) *In re Fitzgerald*, Lloyd & Goold, 20; *ex parte Whitley*, Id. 23; *in re Anderson*, Id. 27.

(*r*) *In re Nicholls*, Id. 17; *ex parte Whitley*, *ubi supra*.

might apply by petition under the former sections of the act, that is, in cases of disability by reason of infancy, lunacy, &c. If you have a right to apply under the former sections, this section enables the Court to appoint new trustees although no bill has been filed, and although there is no power in the instrument creating the trust. If a disability exist, to whom is the estate to be conveyed? Either to trustees appointed under a power in the settlement itself, or to trustees appointed by a court of competent jurisdiction in a suit, or by the Court under the twenty-second section of this act. But no general authority exists in this Court to appoint new trustees where there is no power in the settlement, unless where a bill has been regularly filed (*s*).” And as regards the application of the clause to none but very plain cases, his Lordship observed, “ All the act does is to give the Court authority to make an order appointing new trustees, if the Court should see its way, and has jurisdiction by reason of a disability or the like. If there be a power in the original instrument, or if a bill be filed for the purpose, the Court may direct a transfer to the trustees appointed under the power or by the Court in the suit. But then there may be so very plain a case, as that this Court may appoint new trustees although no suit has been instituted, or no power be contained in the original instrument creating the trusts. The twenty-second clause was framed to meet such a case. The act was intended to apply to a plain case without any ambiguity, or to the case of a recent creation of trust (*t*); for instance, to a recent trust created within ten years, or a simple trust for A. for her separate use

(*s*) *In re Fitzgerald*, Id. 21.

(*t*) *Ex parte Whitley*, Id. 26.

for her life, remainder to B. in fee, where the trustee has died or gone abroad, and no question can arise : but as to applying the act to all cases where there has been a want of providence in the parties, I will not do so ; I have no such power under the act (u)."

Where personal estate was vested in two trustees upon trust to lay it out in a purchase of lands to be held by them upon certain trusts, and part of the money was laid out, and then the surviving trustee died intestate, and there was no administrator, and the heir was out of the jurisdiction, it was held, on the presentation of a petition for the appointment of new trustees, that *quatenus* the real estate the heir was within the act, and new trustees might have been appointed ; but *quatenus* the personalty the parties were at liberty to take out administration to the surviving trustee, and in this respect, there being no necessity for the interference of the Court, the appointment of new trustees could only be obtained by suit. That as a bill was therefore necessary for the appointment of new trustees of the personal estate, and the same persons ought of course to be trustees of both the properties, the Court would not make an order for the appointment of trustees of the realty : the Court would not appoint a trustee in an irregular manner, when there must be trustees appointed in a regular way (x).

(u) *In re Nicholls*, Id. 18, 19.

(x) *In re Anderson*, Id. 23.

CHAPTER XXIV.

IN WHAT THE ESTATE OF THE CESTUI QUE TRUST CONSISTS.

DISMISSING the subject of the estate and office of the trustee, we turn our attention to the estate of the *cestui que trust*; and in the present chapter we shall inquire in what the estate of the *cestui que trust* essentially consists, 1. In the simple trust; and, 2. In the special trust.

I. In the *simple* trust the equitable ownership is compounded of the pendency of the profits and the disposition of the estate—the *jus habendi* and *jus disponendi* (a).

1. The equitable owner is entitled to the pendency of the profits. Thus in a trust of lands the *cestui que trust* may compel the trustee to put him in possession of the estate (b).

But of course the rule is general, and can only be applied where the *cestui que trust* is exclusively interested; for where other parties have also a claim, it rests in the discretion of the court whether the actual possession shall remain with the *cestui que trust* or the trustee, and if possession be given to the *cestui que trust*, whether

(a) *Smith v. Wheeler*, 1 Mod. 17, per Pemberton, J. *Attorney-General v. Lord Gore*, Id. 150, per Lord Hardwicke.

(b) *Brown v. How*, Barn. 354;

he shall not hold it under certain conditions and restrictions.

Thus, in *Blake v. Bunbury* (c) a testator devised all his real estate to trustees in fee, upon trust to convey the same for a term of 500 years, (the trusts of which were to raise certain annuities and sums in gross,) and subject thereto to the use of A. for life with remainders over. A. filed a bill, praying to be let into possession. At the hearing of the cause a general account was directed of the testator's estates and of the charges upon them, and the plaintiff further desired that he might be let into *immediate* possession; but Lord Thurlow said, "It is impossible for me to let him into possession till I have the accounts before me, and even till the trusts are executed, unless, as he now offers, he pays into Court a sum sufficient to answer all the purposes of the trust. The Court, perhaps, has let tenant for life into possession, where it has seen that the best way of performing the trusts would be by letting him into possession, as where an annuity of 100*l.* a year is charged upon an estate of 5000*l.* a year; but till the account is taken I do not know but the purposes of the trust may take up the whole; and if I was to do it now, perhaps I should only have to resume the estate." The accounts were afterwards taken, and the plaintiff was let into possession on giving security to the amount of 10,000*l.* to abide the order of the Court as to the annuities and other incumbrances (d).

In the case of *Tidd v. Lister* (e) a testator devised

(c) 1 Ves. jun. 194. See the case more fully stated, *Ib.* 514, 4 B. C. C. 21.

(d) *S. C.* 4 B. C. C. 28.
(e) 5 Mad. 429.

and bequeathed all his real and personal estate to trustees upon trust to pay his funeral expenses and debts, to keep the buildings upon the estate insured against fire, to satisfy the premiums upon two policies of insurance on the lives of his two sons, to allow his said sons an annuity of 60 guineas each, and subject thereto upon trust for his daughter for life, with remainders over; and, the personal estate having sufficed to discharge the funeral expenses, debts, and annuities, the daughter, who was then a *feme covert*, filed a bill praying to be let into possession upon securing the amount of the premiums of the policies: but Sir J. Leach said, "It is perfectly plain from the continuing nature of this trust, that the testator intended the actual possession of the trust property should remain with the trustees; and it did appear to me a singular proposition, that if a testator, who gives in the first instance a beneficial interest for life only, thinks fit to place the direction of the property in other hands, which is an obvious means of securing the provident management of that property for the advantage of those who are to take in succession, it should be a principle in a Court of Equity to disappoint that intention, and to deliver over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have to prefer his own interest to the fair right of those who are to take in remainder. Independently of the purpose of management of the property, a testator may be considered in the case of a female *cestui que trust* for life as having a further view to her personal protection in the case of her marriage. There may be cases in which it may be plain from the *expressions in the will*, that the testator did not intend the property should remain under the personal management of the trustees.

There may be cases in which it may be plain from the *nature of the property*, that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence. There may be very special cases in which this Court would deliver the possession of the property to the *cestui que trust* for life, *although the testator's intention appeared to be that it should remain with the trustees*; as where the personal occupation of the trust property was beneficial to the *cestui que trust*, there the Court, by taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator." And his Honour refused the application.

In another case A. granted an annuity to B. with powers of distress and entry, and demised an estate for 200 years to C. upon trust, to permit A. to receive the rents until the annuity should be in arrear forty days, and, when in arrear for that period, out of the rents, issues, and profits, or by demising, assigning, or otherwise disposing of the term, or by bringing actions against the tenants, or by such other means as should seem meet, to raise the arrears of the annuity, and to pay the surplus, if any, to the grantor. The annuities fell in arrear, and the trustee gave notice to the tenants to pay the rents to himself, and appointed a receiver, to whom the rents were afterwards paid. A. discharged the arrears of the annuities, and then applied to the trustee to deliver up the possession, which was refused. The point was submitted to the judgment of the Court, and Lord Eldon said, "If you look to the powers of *distress and entry*, you will not find in either of them that any thing

is said respecting the grantor's being permitted to *receive the rents*, or what is to be done with the surplus. The first trust of the *term* is to permit the grantor to *receive the rents*, but that is different from a trust allowing him to continue in *possession*. Under this deed, though the trustee has the legal estate, he has no right to the use of it, until default has been made in payment of the annuities for forty days; but then he becomes a trustee both for the grantor and the grantee—for the latter to raise the arrears, and, to do that, he is entitled to take the rents. If he takes more rents than are sufficient to satisfy the arrears, he is bound to pay the surplus to the grantor; if he receives enough for that purpose, he is bound to permit and suffer the grantor of the annuity to receive the remainder; and it is a very different thing for the grantor to have that species of possession, and one which cannot be disturbed without another ejectment being brought. In this case, therefore, I must either appoint a receiver, or compel the trustee so to authorize the grantor to receive the rents and profits, that he shall have the full benefit of them, short of obliging the trustee to bring an ejectment to remove him. An undertaking on the part of the grantor to deliver up possession when the annuities are in arrear for forty days, is not sufficient, for the Court may not be able to carry that into execution; as, for instance, in the case of the grantor's going out of the jurisdiction. If the grantor is made to receive the rents *in the name of the trustee*, it will not signify what becomes of the grantor, as the trustee may in that case receive them as well as he." And on a subsequent day his Lordship observed, "The grantor must receive the rents so as to preserve the possession of the trustee under the term. The rents must

be received by him as the agent of the trustee, and the receipts must be given in his name." And the order was that the trustee should permit the grantor to receive the rents until the further order of the Court; but such rents were to be received by the grantor in the name of the trustee, and the receipts for the same were to be given accordingly; and the grantor was to be at liberty to use the name of the trustee in making and supporting distresses for rent, the grantor indemnifying the trustee from all costs and damages.

The *cestui que trust's* right to the possession is recognized, we must remember, in a court of *equity* only; for in a court of *law* the *cestui que trust* is merely tenant at will, or at sufferance (*f*). The doctrines advanced by Lord Mansfield in the last century have been long since overruled. It was maintained in his day, that a *cestui que trust*, a plaintiff in ejectment, could not be nonsuited by a term outstanding in his trustee (*g*); and that a trustee, a plaintiff in ejectment, could not recover against his own *cestui que trust* (*h*). It was even decided, that, where a term had been created for securing an annuity, and subject thereto upon trust to attend the inheritance, the tenant of the freehold was entitled to recover the possession (provided he claimed subject to the charge), notwithstanding the legal term was outstanding in a trustee upon trusts that were still unsatisfied (*i*). Such at least were the doctrines in cases of *clear trusts*: for

(*f*) See *Geary v. Bearcroft*, O. Bridg. 486—490.

(*h*) *Armstrong v. Peirse*, 3 Burr. 1901.

(*g*) *Lade v. Halford*, B. N. P. 110. The doctrine is said to have originated with Mr. Justice Gundy.

(*i*) *Bristow v. Pegge*, 1 T. R. 758, note (*a*); overruled by *Doe v. Staple*, 2 T. R. 684.

where the equity was at all *doubtful*, the rights of the parties were even then referred to the proper tribunal (*k*).

The law has since retired into its regular channel, and at the present day we may regard it as established:—first, that a *cestui que trust* cannot recover in ejectment (*l*), unless a surrender to him of the legal estate can be reasonably presumed (*m*), (which of course cannot be where the circumstance of the outstanding legal estate appears on the declaration or special case (*n*),) the *cestui que trust* having no alternative but to bring his action in the name of the trustee, who must be indemnified against the costs (*o*); and, secondly, that the trustee, as the tenant of the legal estate, may recover in ejectment from his own *cestui que trust* (*p*); and the *cestui que trust* has no defence to the action at law, but is only entitled to sue an injunction in equity (*q*).

Upon the principle that the *cestui que trust* is *fore conscientiæ* entitled to the pertainancy of the profits, he has been invested by the express language of some statutes, and by the equitable construction of others, with the

(*k*) *Doe v. Pott*, Doug. 695, T. R. 122.

per Lord Mansfield; *Goodright v. Wells*, Id. 747, per eundem.

(*l*) *Doe v. Staple*, ubi supra; see *Barnes v. Crow*, 4 B. C. C. 10 & 11; *Doe v. Sybourn*, 7 T. R. 3; *Goodtitle v. Jones*, 7 T. R. 45 and following pages; *Doe v. Wroot*, 5 East, 138.

(*m*) *Doe v. Sybourn*, 7 T. R. 2; see *Doe v. Staple*, 2 T. R. 696; *Goodtitle v. Jones*, 7 T. R. 45, and following pages; *Roe v. Reade*, 8

(*n*) *Goodtitle v. Jones*, 7 T. R. 43; see *Doe v. Staple*, 2 T. R. 696; *Roe v. Reade*, 8 T. R. 122.

(*o*) *Annesley v. Simeon*, 4 Mad. 390; and see *Reade v. Sparkes*, 1 Moll. 11; *Jenkins v. Milford*, 1 J. & W. 635.

(*p*) See *Roe v. Reade*, 8 T. R. 122, 123.

(*q*) *Shine v. Gough*, 1 B. & B. 445.

various privileges conferred by the legislature upon the possession of real estate.

By the 2 H. 5, st. 2, c. 3, a person was disabled from serving as a common juror, unless he had "*lands or tenements* of the yearly value of 40*s.* above all charges" (r); upon which enactment Lord Coke observes, that "albeit in law the land was the trustee's, yet for that the *cestui que trust* took the whole profit, and in equity and conscience the land was his, the judges, for advancement and expedition of justice, had extended the statute against the letter to the *cestui que trust*, and not to the trustee (s)." By a statute of W. & M. (t), which extended the like privilege to copyholds, it was expressly enacted, that persons to serve as jurors should have freeholds or copyholds of the value of 4*l.*, (to which the qualification had been raised by a previous statute (u),) in their own name, or *in trust for them*. The 3 Geo. 2, c. 25, has since conferred the privilege upon certain leaseholders, viz., upon "persons having an estate in lands for the term of 500 years absolute, or any term determinable upon a life or lives of the clear yearly value of 20*l.* over and above the rent reserved;" which enactment, it is presumed, must be intended to mean the *cestui que trust*, and not the trustee of the term.

By the Game Act, 22 & 23 Car. 2, c. 25, s. 3, it was declared that persons to be qualified to sport should have either *lands and tenements* of the clear value of 100*l. per annum*; and it was decided that a *cestui que trust* of lands

(r) The qualification by 13 Ed. 1, st. 1, c. 38, was 20*s.* It was afterwards, by 21 Ed. 1, st. 1, raised to 40*s.*, but still was not required to be "above all charges."

(s) Co. Lit. 272. b; and see Bac. Uses, 8.

(t) 4 & 5 W. & M. c. 24, s. 15.

(u) 27 El. c. 6.

to that amount was within the intention of the act, Lord Mansfield observing, that "the privilege was given to *property*, and the *cestui que trust* was *substantially* the owner, and the trustee only *nominally* (x)." By the provisions of the late Game Act no qualification is now necessary (y).

The election of a coroner is a right vested in the *freeholders* of the county; but by legislative enactment the privilege of voting, which belonged originally to the *legal* freeholder, has been withdrawn from the trustee, except he be in actual possession or receipt of the rents and profits, and has been conferred upon the *cestui que trust* in possession (z).

To vote in the election of knights of a shire, a person was formerly required by statute to have a *freehold* of the annual value of 40s. (a); but the privilege was afterwards, by a statute of William the Third (b), transferred to the *cestui que trust* "in possession." The *cestui que trust* of a *freehold* must still, to be qualified as an elector, be in *possession* of the estate; but by a clause in the Reform Act (c), the *cestui que trust* of "lands or tenements of *copyhold* or *any other tenure whatever, except freehold*, for his own life or for the life of another, or for any lives whatsoever, or for any larger estate, of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same," is entitled to vote, whether in possession or not; for the privilege is conferred upon persons "seised at law or in *equity*" of such estates, and no mention is made of any restriction.

(x) *Wetherell v. Hall*, Cald. 230.

(b) 7 & 8 W. 3, c. 25, s. 7.

(y) 1 & 2 W. 4, c. 32.

Re-enacted by 2 W. 4, c. 45, s. 23.

(z) 58 Geo. 3, c. 95, s. 2.

(c) 2 W. 4, c. 45, s. 19.

(a) 8 H. 6, c. 7; 10 H. 6, c. 2.

A *cestui que trust* for his own life, or for any greater estate, of freehold or copyhold property of the annual value of 600*l.* in respect of a county, or of 300*l.* in respect of a city or borough, is qualified to sit as a member of the House of Commons, the statute expressly including estates *in equity* (*d*).

Hitherto we have spoken of the *cestui que trust's* right to the profits and privileges proceeding from *lands*. In trusts of *chattels personal*, as where heirlooms are vested in a trustee upon trust for the persons successively entitled under the limitations of a strict settlement, the *cestui que trust* for the time being is equally entitled to the use and possession of the goods during the continuance of his interest; and upon the ground of this right the goods are not forfeited on the bankruptcy or insolvency of the tenant for life, though left in the possession of the bankrupt or insolvent by permission of the legal owner, for they are left with him *according to the title* (*e*).

Where the chattels are mere *household goods*, it seems the *cestui que trust* may use them in his own or in any other person's house, and either alone or promiscuously with other goods, or may let them out to hire (*f*); but, where the chattels are *heirlooms annexed to a house*, and their continuance in the mansion is evidently a constituent part of the trust, they cannot be let to hire but together with the house itself (*g*). Of course the use of the chattels by the tenant for life does not enable him to pawn them beyond the extent of his own interest (*h*).

Where the trust fund consists of stock, the *cestui que*

(*d*) 9 Ann. c. 5.

(*g*) *Cadogan v. Kennet*, Cowp.

(*e*) See *supra*, p. 257.

432.

(*f*) *Marshall v. Blew*, 2 Atk.

(*h*) *Hoare v. Parker*, 2 T. R.

217.

376.

trust is usually put in possession of the dividends by a power of attorney from the trustee. By this arrangement the trustee is spared the trouble of repeated personal attendances at the Bank, and the entries in the books of the Company are sufficient evidence of the receipt.

2. The *cestui que trust* has *jus disponendi*, that is, may call upon the trustee to execute conveyances of the estate as the *cestui que trust* may direct. If the trustee refuse to comply, and the *cestui que trust* file a bill to compel him, the trustee will be visited with the costs⁽ⁱ⁾, (unless there was some reasonable ground for his refusal ^(k)), though the *cestui que trust*, instead of filing a bill, might have enforced a conveyance by the summary process of a petition^(l). But Lord Eldon was of opinion a trustee could not be called upon to divest himself from time to time of different parcels of the trust estate; for the trustee had a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper^(m)." And a trustee, like a mortgagee, cannot be required to convey the estate by any other words or description than that by which the conveyance was made to himself⁽ⁿ⁾.

But the *cestui que trust* has no *jus disponendi* where the trustee holds also upon trust for the benefit of others, as upon trust in the first place to secure an annuity^(o), or to pay the premiums of a policy^(p), or where the

(i) *Jones v. Lewis*, 1 Cox, 199. Mad. 10.

(k) *Goodson v. Ellisson*, 3 Russ. 583.

(n) *Goodson v. Ellisson*, *ubi supra*.

(l) *Watts v. Turner*, 1 R. & M. 634.

(o) *Burt v. Dennet*, 2 B. C. C. 225.

(m) *Goodson v. Ellisson*, 3 Russ. 594; and see *Smith v. Snow*, 3

(p) *Tidd v. Lister*, 5 Mad. 429.

cestui que trust is entitled to the whole *usufructuary* interest, but the retainer of the legal estate in the hands of the trustee answers some ulterior purpose, as in a limitation to trustees and their heirs *pur autre vie* upon trust to pay the proceeds to the tenant for life, but also upon trust to preserve contingent remainders.

It must frequently happen that the *cestui que trust* is undoubtedly entitled to call for a conveyance, but from the disability of the trustee, or some other accidental circumstance, the object of the party cannot by the ordinary course of law be carried into effect. To obviate the prejudice to which in these cases the interest of the *cestui que trust* might be liable, the legislature has from time to time interposed its aid by remedial statutes.

The first Act of the kind was the 7 Anne, c. 19, which provided for the case of *infancy* in respect of *lands*. It was thereby declared that "it should be lawful for infants having estates in lands only in trust for others, or by way of mortgage, by the direction of the Court of Chancery or Exchequer, by order made on the petition of the *cestui que trust*, mortgagor, or other person interested, to convey the said lands as the Court of Chancery or Exchequer should direct."

This statute was held to extend neither to constructive trusts (*q*), (except, perhaps, after a decree had established the right (*r*),) nor to cases where the infant himself possessed an interest (*s*), nor where any personal duty was

(*q*) *Goodwyn v. Lister*, 3 P. W. 549; *Smith v. Hibbard*, 2 Dick. 387; *Anon. case*, cited *Ib.* 389, 730.

note (*A*); *Jerdon v. Foster*, cited (r) *Price v. Oneby*, cited F. P. Sanders on Uses, 356, 4th edit.; W. 239; *Hawkins v. Obeen*, 2 Ves. *Sikes v. Lister*, 5 Vin. Ab. 541; 559.

in re Janaway, 7 Price, 679; (s) *Hawkins v. Obeen*, *ubi supra*; *ex parte Sergison*, 4 Ves. but see *ex parte Vernon*, 2 P. W.

imposed upon the trustee (*t*), though all the *cœstis que trust* might be willing to concur (*u*). The act directing the application to be made by *petition*, the Court considered such an interlocutory method to indicate an intention of remedying only the *plainest* cases of trust.

The next statute was the 4 Geo. 2, c. 10, which provided for the disability of *lunacy* in respect of *lands*. It was thereby enacted that "it should be lawful for idiots, lunatics, and persons *non compos* having estates in lands only in trust for others, or by way of mortgage, or for their committees, by the direction of the Lord Chancellor on petition to convey the lands whereof such idiots, lunatics, or persons *non compos* should be seised or possessed on trust or by way of mortgage, as the Lord Chancellor should direct."

This statute, as it followed the language, so it received the interpretation of the statute of Anne; and it was held not to apply to *constructive* trusts, or to cases where the trustee was concerned in *interest*, or had any *duty* to perform (*x*). Nor did the act extend to a lunatic who had not been expressly found such by inquisition (*y*).

147; *ex parte Tutin*, 3 V. & B. 149; — *v. Handcock*, 17 Ves. 384, *per* Lord Eldon; and see *ex parte Bellamy*, 2 Cox, 422; *ex parte Carter*, 2 Dick. 609.

(*t*) *Ex parte Tutin*, 3 V. & B. 149; *Riggs v. Sykes*, 1 Dick. 400. But in *Attorney-General v. Pomfret*, 2 Cox, 221, Lord Alvanley held, that, where new trustees were duly appointed, the circumstance of a duty to perform would not take the case out of the statute, for by the conveyance to the new

trustees the duty, as regarded the old trustees, would cease, and be laid upon others; but if there were no appointment of new trustees, then the statute would not apply.

(*u*) *Ex parte Chastaney*, 1 Jac. 56.

(*x*) *Ex parte Currie*, 1 J. & W. 642; *ex parte Tutin*, 3 V. & B. 149.

(*y*) *Ex parte Gillam*, 2 Ves. jun. 587; and see *ex parte Otto Lewis*, 1 Ves. 298.

Hitherto the remedial enactments had reference to *lands* only, but by the 36 Geo. 3, c. 90, the legislature provided for similar inconveniences in respect of *stock*. The statute declared, that "when trustees of stock or the personal representatives of such persons deceased should be *out of the jurisdiction or not amenable to the process of the court*, or should be *bankrupts or lunatics*, or should *refuse to transfer the stock*, or it should be *uncertain or unknown whether they were living or dead* (z), it should be lawful for the Court of Chancery or Exchequer in any cause depending to direct or order a transfer of such stock."

This statute also was held not to apply to lunatics who had not been found such by inquisition (a); a defect which, however, was afterwards remedied by 1 & 2 Geo. 4, c. 114.

The enactments of the preceding statutes were all consolidated and amended by the 6 Geo. 4, c. 74, and provision was further made for the case of a trustee possessing an *interest*, or having a *duty* to perform; but still the Court had no jurisdiction where the trust was *constructive* (b), though it seems the act originally contained such a clause, but Lord Redesdale objected to it strongly, and it was struck out (c).

This statute has since been repealed, and the provisions of it, with material alterations, additions, and im-

(z) It is almost unnecessary to observe, that in the case of *infancy* no remedy was needed in respect of stock; for if the executor of a trustee happened to be an infant, administration might have been granted to a stranger *durante minoritate*.

(a) See *Sylva v. Da Costa*, 8 Ves. 316; *Simms v. Naylor*, 4 Ves. 360; *West v. Ayles*, 1 Turn. & Russ. 330.

(b) *King v. Turner*, 2 Sim. 549; *Dew v. Clarke*, 4 Russ. 511; *in re Moody*, Taml. 4.

(c) *Dew v. Clark*, 4 Russ. 514.

provements, have been re-enacted by Sir E. Sugden's Trustee Act, the 11 G. 4 & 1 W. 4, c. 60, which we now proceed to consider.

The third, fourth, and fifth sections relate exclusively to *lunatics*. By the third and fourth, the *committee of the estate* of a lunatic, idiot, or *non compos*, may, by direction of the *Lord Chancellor* (*d*), convey the trust lands or transfer the trust stock (*e*); and by the fifth section, where the lunatic has not been found such by inquisition, and so there is no committee, the Lord Chancellor may *appoint* a person to make the conveyance or transfer.

The sixth section remedies the disability of *infancy* in respect of *lands* vested in them upon trust or by way of mortgage (*f*), and enables them to convey under the direction of the Court, such conveyance to be as valid as if the infant were adult (*g*).

(*d*) The Lord Chancellor has jurisdiction in respect of lunatics and idiots, not as presiding over a court of equity, but by virtue of an authority specially delegated to him by the Crown; and therefore the Vice-Chancellor can neither direct the reference to the master in the first instance, nor make the final order. *In re Shorrocks*, 1 M. & C. 31, overruling *Anon. case*, 5 Sim. 322.

(*e*) The costs of the committee will be charged on the lunatic's estate. *Ex parte Brydges*, Coop. 290.

(*f*) *Prendergast v. Eyre*, L. & G. 11.

(*g*) Infancy is provided for in respect of *freeholds* only, and not of *chattels* real or personal, for the reason before assigned with regard to stock. See note (*s*), last page. As the conveyance of an infant under the act will only be as effectual as if he were adult, it must be seen that the conveyance would be effectual were the infant of age. Thus, before the abolition of fines and recoveries, had the trustee devised the estate to an infant *in tail*, the conveyance must have been by recovery. *Ex parte Johnson*, 3 Atk. 559; *ex parte Smith*, Amb. 624. So, if the infant had been a feme covert, the conveyance must have

The 8th section remedies sundry other inconveniences in the case of *freeholds*; and it is thereby enacted, that where any person seised of land upon any trust (*h*) shall be *out of the jurisdiction or not amenable to the process of the Court*, or it shall be *uncertain where there were several trustees which of them was the survivor*, or it shall be *uncertain whether the trustee last known to have been seised as aforesaid be living or dead*, or if known to be dead it shall not be known who is his heir, or if any trustee seised as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such lands for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any

been by fine. *Ex parte Maire*, 3 Atk. 479. Now that fines and recoveries have been abolished, the assurance in these cases must be attended with the formalities required by the late act. *Radcliffe v. Eccles*, 1 Keene, 130.

(*h*) It was at first held, that this did not include a *complicated* trust (*ex parte Merry*, 1 M. & K. 677); but the 12th section authorizing the Court, where it should be proper, to direct a bill to be filed to establish the right, it was afterwards ruled that the Court had a discretion of making an order in such a trust upon *ex parte* application. *In re De Clifford*, 2 M. & K. 624, 820.

So it was originally the opinion of the Court, that "trust" did not in-

clude a mortgage. *In re Goddard*, 1 M. & K. 25; *ex parte Payne*, 6 Sim. 645; *in re Stanley*, 5 Sim. 320. But the Escheat and Forfeiture Act (4 & 5 W. 4, c. 23, s. 2) declaring, that "where any person seised of any land upon any trust or by way of mortgage died without an heir, it should be lawful for the Court of Chancery to appoint a person to convey in like manner as was provided" (by Sir E. Sugden's Trustee Act) "in case such trustee or mortgagee had left an heir and it was not known who was such heir," it was held, as the legislature could best interpret its own provisions, that the 8th section of the act did extend to a mortgage. *Ex parte Whitton*, 1 Keene, 278; *in re Stanley*, 7 Sim. 170.

person entitled to require the same (i), it shall be lawful for the Court to appoint a person to convey, such conveyance to be as effectual as if executed by the trustee or his heir.

The 9th section remedies certain inconveniences relating to *chattels real*, and enacts, that where any person possessed of land for a term of years upon trust shall be *out of the jurisdiction or not amenable to the process of the Court*, or it shall be *uncertain whether the trustee last known to have been possessed as aforesaid shall be living or dead (k)*, or if any trustee as aforesaid, or the executor of any such trustee, shall *neglect or refuse, &c.*, (as in the former clause,) it shall be lawful for the Court to appoint a person to make a vicarious assignment or surrender, such assignment or surrender to be as valid as if made by the trustee or executor.

The 10th section relates to inconveniences in respect of *stock*, and enacts, that where any person in whose name as a trustee or executor (either alone or together with the name of any other person), or in the name of whose testator (whether as a trustee or beneficially), any stock shall be standing, or any other person who shall

(i) Note, the tender must be made by "the persons entitled to require the same," that is, by all the *cestuis que trust*, and therefore if any *cestui que trust* from disability or otherwise do not join in the tender, there is no neglect or refusal within the meaning of this clause. But see *Mansfield v. Maquay*, 2 Moll. 153.

(k) The words in the preceding clause, "where it shall be uncer-

tain, where there were several trustees, which of them was the survivor," are here omitted; for in respect of chattels the personal representatives of both the trustees may assign, or if there be no such representatives, administration may be taken out to both. It was not intended to provide by the act for any case which could be remedied in any other mode. See *in re Anderson*, Lloyd & Goold, 27.

otherwise have power to transfer, or join with any other person in transferring, any stock to which some other person shall be beneficially entitled, shall be *out of the jurisdiction or not amenable to the process of the Court (l)*, or it shall be *uncertain whether such person be living or dead*, or if any such trustee or executor or other person shall *neglect or refuse to transfer such stock or receive and pay over the dividends thereof for the space of thirty-one days after request in writing by the person entitled as aforesaid (m)*, the Court may appoint a person to transfer the stock, or receive and pay over the dividends, such transfer, receipt, or payment to be as effectual as if made by such trustee, executor, or other person.

The 11th section determines the *mode* of application by declaring that every direction or order to be made under the act shall be signified either by an order made in any cause depending in the Court (*n*), or upon petition in the lunacy or matter (*o*).

By the 12th section, where, from the length of time since the creation of the trust, the title of the person claiming the conveyance or transfer may require investigation, or it may otherwise appear improper to make an order on *petition*, the Court may direct a *bill* to be filed to establish the right.

(l) *Ex parte Dover*, 5 Sim. 500.

Where a trustee commanded a merchant vessel, and was on his voyage to India, it was held he was not out of the jurisdiction within the meaning of the act. *Hutchinson v. Stephens*, 5 Sim. 498.

(m) See note (i) last page.

(n) Where a suit is depending, the order may be made on the de-

cree without a petition. *Miller v. Knight*, 1 Keene, 129; *Broom v. Broom*, 3 M. & K. 443; *Walton v. Merry*, 6 Sim. 328; overruling *Fellowes v. Till*, 5 Sim. 319; *Prytharch v. Havard*, 6 Sim. 9.

(o) The order cannot be made upon motion. *Evelyn v. Forster*, 8 Ves. 96; *Baynes v. Baynes*, 9 Ves. 462.

The 15th section extends the act to trustees possessing an *interest*, or having a *duty* to perform, with power reserved to the Court, where it may be requisite, to order a bill to be filed to establish the right.

The 16th, 17th, and 18th sections relate to *constructive* trusts. The 16th section extends the act to the *heir* of a vendor after a decree of specific performance, and to a nominal purchaser or his heir, such nominal purchaser appearing on the face of the deed to be the real purchaser, after a decree declaring such nominal purchaser to be a trustee for the real purchaser. By the 17th section, where the *vendor* has devised the estate for life, or other limited interest, with a gift over which may not be vested, or may be vested in a person from whom a conveyance cannot be obtained, or has by his will subjected the estate to an executory devise, the tenant for life, or person having the limited interest, or the first executory devisee, is enabled to convey the estate as if seised in fee simple. The 18th section extends the act to *every other constructive* trust; but, where the alleged trustee claims an interest adversely to the applicant, no order is to be made until the trust shall have been established in a suit; and the act is not to apply to cases upon *partition* or *election*, or to a *vendor* otherwise than as thereinbefore provided for.

By the 19th section, where the trustee within the act is a *feme covert*, and the concurrence of the husband is necessary for any conveyance, transfer, receipt, or payment, such husband, whether under disability or not, is a trustee within the act.

The 22d section, relating to the appointment of new trustees in certain cases on petition, has been considered in another place (*p*).

(*p*) See *supra*, ch. 23.

By the 23d section, where all the trustees of any *charitable* or *public* trust are dead, and the representative of the last surviving trustee shall not appear or give notice of his title within twenty-eight days after advertisement, or not prove his title within thirty-one days after such appearance or notice, the Court may appoint new trustees under the provisions of the act.

The 26th, 29th, and 30th sections extend the powers of the Lord Chancellor over all the king's dominions except Scotland and Ireland, and the powers of the Courts of Chancery and Exchequer over all the king's dominions except Scotland.

The 32d section declares *who* shall be appointed by the Court to make transfers of stock, viz., the committee of the estate of the lunatic, or a co-trustee or co-executor of any trustee or executor against whom the relief is sought, or some officer of the company in whose books the transfer is to be made; and, in respect of transfers in the books of the Bank of England, the secretary, or deputy secretary, or accountant-general of the Bank.

II. Having treated of the *jus habendi* and *jus disponendi*, which constitute the *simple* trust, we come now to speak of the *cestui que trust's* estate in the case of the *special* trust; and this may be said to be, The right to enforce in equity the specific execution of the settlor's intention to the extent of that *cestui que trust's* particular interest. The other parties entitled may express a desire that the trust should be differently administered; but if such a divergence from the donor's will would prejudice or injuriously affect the rights of any one *cestui que trust*, that *cestui que trust* may compel the trustees to adhere

strictly and literally to the line of duty prescribed to them (q).

If there be only *one cestui que trust*, or there be several *cestuis que trust*, and all of *one mind*, the specific execution may be stayed, and the *special* trust will then acquire the character of a *simple* trust; for whatever modifications of the estate the settlor may have contemplated, through whatever channel he may have originally intended his bounty should flow, the persons to be eventually benefitted are the *cestuis que trust*, and are in equity, from the creation of the trust, and before the trustees have acted in the execution of it, the absolute beneficial proprietors.

The case of *Pearson v. Lane* (r), before Sir W. Grant, will put the subject in a clear light. A conveyance had been made to trustees upon trust to sell, and with the proceeds to purchase other lands to be settled on the daughters of W. J. as tenants in common in tail, with remainder to them in fee. The daughters levied a fine of the *lands to be sold* to the uses and upon the trusts of their respective marriage settlements. It was doubted whether the entail had been effectually barred; but Sir W. Grant said, "It is clear, if the estate had been sold, and another estate purchased, the daughters would have been tenants in tail, with immediate remainders to themselves in fee. It is true in the lands to be sold they had no interest, legal or equitable, *expressly* limited to them; but the equitable interest in those lands must have resided somewhere: the trustees themselves could not be the beneficial owners; and if they were mere trustees, there must have been some *cestuis que trust*. In order to

(q) See *Deeth v. Hale*, 2 Moll. 317. (r) 17 Ves. 101.

ascertain *who* they are, a court of equity inquires for whose benefit the trust was created, and determines that those who are the objects of the trust have the interest in the thing which is the subject of it. Where money is given to be laid out in land which is to be conveyed to A., though there is no gift of the money to him, yet in equity it is his, and he may elect not to have it laid out : so, on the other hand, where land is given upon trust to sell, and pay the produce to A., though no interest in the land is expressly given to him, in equity he is the owner, and the trustee must convey as he shall direct : if there are also other purposes for which it is to be sold, still he is entitled to the surplus of the price, as the equitable owner subject to those purposes ; and if he provides for them, he may keep the estate unsold. The daughters electing to keep this estate, they acquired the fee, and it was discharged of every trust to which it had been subject."

But *until* the *cestui que trust*, or the joint *cestuis que trust*, countermand the specific execution, the special trust will proceed ; as if lands be devised to trustees upon trust to sell, and pay the proceeds to A., the property will remain personal estate in A. until he discharge the character impressed upon it by electing to take it as land (*s*).

When it is said that each *cestui que trust* may compel the specific performance of the trust to the extent of his own benefit, it is of course understood that the trust is of such a lawful description, that the Court will not, on grounds of public policy, refuse to recognize its existence (*t*).

(*s*) See *infra*.

(*t*) See *supra*, p. 165.

CHAPTER XXV.

PROPERTIES OF THE CESTUI QUE TRUST'S ESTATE.

WE shall next enter upon the properties of the *cestui que trust's* estate as affected by the acts of the *cestui que trust*, or by operation of law.

I. A trust is assignable.

An equitable interest may be assigned, though it be a mere possibility (*a*), and either with or without the intervention of the trustees (*b*); and the assignee of the *cestui que trust* may call upon the trustee to convey to him, and on his refusal may file a bill to compel a conveyance without making the assignor a party (*c*).

Before the Statute of Frauds (*d*), the transfer might have been made by *parole*; but now, by the ninth section of that Act, all grants and assignments of any trust or confidence are required to be in writing, signed by the party granting or assigning the same, or else are declared utterly void. But though a deed be not *absolutely necessary*, it is the practice, *ex majori cautela*, to employ the

(*a*) *Courthope v. Heyman*, Cart. 25; *Warmstrey v. Tanfield*, 1 Ch. Re. 29; *Goring v. Bickerstaff*, 1 Ch. Ca. 8; *Cornbury v. Middleton*, Ib. 211, *per* Judges Wyld and Rainsford; *Burgess v. Wheate*, 1 Ed. 195, *per* Sir T. Clarke; 21

Vin. Ab. 516, pl. 1.

(*b*) *Philips v. Brydges*, 3 Ves. 127, *per* Lord Alvanley.

(*c*) *Goodson v. Ellison*, 3 Russ. 583.

(*d*) 29 Car. 2, c. 3.

same species of instrument, and adopt the same form of words, in the transfer of an equitable, as in the conveyance of a legal estate.

An equitable interest in lands could not, before the abolition of fines and recoveries, have been passed by a *feme covert* but by fine or recovery (*e*); and now that by the Fines and Recoveries Act (*f*) those assurances have been abolished, the *deed* of the *feme covert*, which has been substituted in their place, must be executed with the same formalities in passing *equitable* as in dealing with *legal* estates.

The power of the equitable *tenant in tail* to dispose of the *equitable fee* has been differently modified at different periods, and some account of the fluctuation of the law in this respect may serve to illustrate the general principles upon which trusts have been administered.

At common law all inheritable estates were in fee-simple, and it was the statute *de donis* (*g*) that first gave rise to entails and expectant remainders. As the Statute of Westminster the Second was long prior to the introduction of uses, had equity followed the analogy of the common law only, a trust limited to A. and the heirs of his body, with remainder over, had been construed a fee simple conditional, and the remainder had been void; but the known legal estates of the day, whether parcel of the common law or ingrafted by statute, were copied without distinction into the system of trusts, and, equitable entails indisputably existing, the question in constant dispute was, by what process they should be barred.

In *legal* entails the only modes of unfettering the

(*e*) *Penne v. Peacock*, Rep. i. Talb. 41; *Price v. Copner*, 1 Sim. & Stu. 347. (f) 3 & 4 G. 4, c. 74. (g) 13 E. 1, st. 1, c. 1.

estate were by fine or recovery. A fine was by statutory enactment conclusive on all *privies*, and therefore a *cestui que trust*, though he had not the freehold, could nevertheless have barred his issue, who were his privies in blood and estate. A recovery had no operation unless the tenant to the *præcipe* was seised of the legal freehold in possession, and as the *cestui que trust* had merely a *right*, and not a *freehold*, it followed he could not by recovery bar either his issue or the remaindermen. There were certainly some doubts upon the law in this particular, but such is the conclusion drawn from the conflicting cases by Lord Chief Baron Gilbert. "If *cestui que use*," he observes, "aliene by fine, that is good, and bars the entry of the feoffees (*h*) after his death by the statute 4 H. 7; but if he aliene by recovery, it does *not* bind the issue, because he is not tenant to the *præcipe* (*i*)."

The statute of H. 8 merged the use in the possession, and when the trust succeeded to the use, and "appeared in his likeness," the effect of a fine and recovery was now to be settled by the Court *ab integro*. It was agreed, as before, that a *fine*, as it concluded all *privies*, would defeat the claim of the issue (*k*); but as the *cestui que trust* had no *seisin* of the freehold, it was long disputed what should be the operation of a *recovery*. Lord Clarendon, assisted by Sir Harbottle Grimston and Justice Windham, held, that the recovery of a *cestui que trust* should bar and transfer the trust, as it should an estate at law, *if it were upon consideration*, but otherwise Justice Wind-

(*h*) By 1 R. 3, c. 1, the *cestui* to the uses in remainder.

que use in possession, though for life only, had authority to pass the legal fee; but when his right to the possession had determined, the feoffees might re-enter, and hold

(*i*) Gilb. Uses, 32.

(*k*) *Goodrick v. Brown*, 1 Ch. Ca. 49; *Washborn v. Downes*, Ib. 213.

ham doubted of it (*l*). But this was merely a resolution, and the next year an opinion was expressed by Lord Keeper Bridgman, that a recovery should *not* bar (*m*). The point afterwards came before the Lord Keeper a second time (*n*), and it was admitted a *fine* would bar the issue, though not the remainder over, but whether anything would be barred by the *cestui que trust's recovery* the Court doubted; for "if tenant in tail at law suffered a recovery, legal exception smight be taken to it, but if a recovery might be suffered in equity, all those exceptions would be taken away." It was contended in the same case, that if *cestui que trust's recovery* was not allowed to bar, there would result a perpetuity; but a perpetuity was defined to be "where, if all who had interest joined, they could not bar or pass the estate; but if by the concurrence of all having interest the estate might be barred, it was no perpetuity." Now, as *cestui que trust* could certainly estop his issue by fine, it was plain that with the concurrence of the remainderman the estate was disposable in fee. Lord Nottingham decided, that a recovery *should* bar the issue and all remainders over (*o*), "it being," he said, "a general rule, that any legal conveyance or assurance by a *cestui que trust* should have the same effect and operation upon the trust as it should have had upon the estate at law in case the trustees had executed their trust: otherwise trustees, by refusing or not being capable to execute their trust, might hinder the tenant in tail of that liberty which the law gave him to dispose of his estate, which would be mani-

(*l*) *Goodrick v. Brown*, 1 Ch. Ca. 213.

Ca. 49.

(*o*) *North v. Williams*, 2 Ch.

(*m*) *Digby v. Langworth*, 1 Ch.

Ca. 63; *North v. Champernoou*,

Ca. 68.

Ib. 78.

(*n*) *Washborn v. Downes*, 1 Ch.

festly inconvenient, and tend to the introduction of perpetuities (*p*).” The stream now flowed in an opposite direction, and it was held by succeeding Chancellors (and Lord Nottingham himself appears to have countenanced the same doctrine (*q*), (that *cestui que trust* might bar his issue and the remainders over by *any* conveyance, as by bargain and sale, or lease and release (*r*), or even by agreement (*s*), or will (*t*). As a trust was not within the statute *de donis*, there could in strictness be no entail of it, and therefore it was thought equity, which regarded the Statute of Westminster “as an ambitious act in favour of the Lords against the King (*u*),” and viewed the trust as its own creature, and to be governed according to conscience, might allow the *quasi* tenant in tail of a trust to bar the issue and remainders over by any expression of intention (1). At length one consistent prin-

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| (<i>p</i>) <i>North v. Champemoon</i> , 2 | P. W. 91. |
| Ch. Ca. 78. | (<i>s</i>) See <i>Norcliff v. Worsley</i> , 1 |
| (<i>q</i>) See <i>North v. Williams</i> , 2 | Ch. Ca. 236. |
| Ch. Ca. 64; <i>S. C.</i> 1 Vern. 14. | (<i>t</i>) <i>Woolnough v. Woolnough</i> , |
| (<i>r</i>) <i>Carpenter v. Carpenter</i> , 1 | Pr. Ch. 228; <i>Turner v. Gwinn</i> , 1 |
| Vern. 440; <i>Beverley v. Beverley</i> , 2 | Vern. 41. |
| Vern. 131; <i>Bowater v. Elly</i> , Ib. | (<i>u</i>) <i>Norcliff v. Worsley</i> , 1 Ch. |
| 344; and see <i>Legate v. Sewell</i> , 1 | Ca. 236, <i>per</i> Lord Nottingham. |

(1) An estate *pur autre vie* is also not within the statute *de donis*, and the *quasi* tenant in tail may bar the issue and remaindermen by a simple conveyance; but the reason of this is not the same as in the case of trusts. If lands *pur autre vie* be limited to A. and the heirs of his body, with remainders over, the entirety of the legal estate is vested in A., and he may absolutely dispose of it. The issue and remaindermen stand in the light of mere special occupants, that is, they have no title *jure suo*, but take the estate by devolution where the owner has made no disposition. A limitation *pur autre vie* has been commonly referred to the nature of a fee conditional; but the principles of the two estates are not to be confounded. The tenant of a fee conditional can only aliene after issue born, but tenant *pur autre vie* may dispose absolutely at any time.

ciple was established by Lord Hardwicke, that as entails with expectant remainders had gained a footing in trusts by analogy to the statute, a court of equity was bound to follow the analogy throughout, and therefore a tenant in tail of a trust ought not to be at liberty to bar his issue and the remaindermen but by a conveyance that would have barred them had the entail been of the legal estate.

The doctrines of equity, as they were finally settled, may be briefly summed up as follows :—

1. For a good equitable recovery there must have been an equitable tenant to the *præcipe*, that is, the owner of the first equitable freehold must necessarily have concurred (*x*).

2. An equitable recovery was a bar to equitable only, and not to legal remainders (*y*).

3. An equitable recovery was not vitiated by the circumstance that the *equitable* tenant to the *præcipe* had also the *legal* freehold (*z*).

4. An equitable remainder was well barred though it was vested in a person who had also the *legal fee* (*a*).

At the present day, by the operation of the Fines and Recoveries Act (*b*), the equitable tenant in tail may dispose of the equitable fee by the same modes of assurance, and with the same formalities, as if he were tenant in tail of the legal estate.

(*x*) *North v. Williams*, 2 Ch. Ca. 64, *per* Lord Nottingham; *Highway v. Banner*, 1 B. C. C. 586; and see *Wykham v. Wykham*, 18 Ves. 418.

(*y*) *Philips v. Brydges*, 3 Ves. 128, *per* Lord Alvanley; *Salvin v. Thornton*, Amb. 545; *S. C.* 1 B. C. C. 73, note.

(*z*) *Philips v. Brydges*, 3 Ves. 126, *per* Lord Alvanley; *Marwood v. Turner*, 3 P. W. 171; *Goodrick v. Brown*, 2 Ch. Ca. 49; *S. C.* Freem. 180.

(*a*) *Philips v. Brydges*, 3 Ves. 120; *Robinson v. Comyns*, Rep. t. Talb. 164; *S. C.* 1 Atk. 473.

(*b*) 3 & 4 Will. 4, c. 84.

In the transfer of an equitable interest, the purchaser, for his security, must never dispense with the two following precautions. First, he must make inquiries of the trustee whether the equity of the vendor has been subjected to any prior incumbrance, for if the trustee be guilty of misrepresentation, or even of mis-statement from forgetfulness, the purchaser may charge him personally with the amount of the consequential loss (*c*). Secondly, upon the execution of the conveyance, the purchaser must give notice of his own equitable title to the trustee, by which means he will gain precedence of all prior incumbrancers who have not been equally diligent, and will prevent his own postponement to subsequent incumbrancers more diligent than himself.

That a purchaser's notice will secure to him this advantage, has only recently been settled. In *Cooper v. Fynmore* (*d*) Sir T. Plumer, Vice-Chancellor, decided that mere neglect to give notice would *not* postpone an incumbrancer, but that such *laches* ought to be shewn as, in a Court of Equity, would amount to fraud; but in *Dearle v. Hall* (*e*), and *Loveridge v. Cooper* (*f*), only nine years after, his Honour, when Master of the Rolls, came to the opposite conclusion, and delivered a very elaborate argument that notice would gain priority. His Honour's judgments were affirmed on appeal (*g*), and the doctrine has since been abundantly recognized both as to personal (*h*) and real estate (*i*).

(*c*) *Burrowes v. Lock*, 10 Ves. 470.

(*d*) 3 Russ. 60.

(*e*) *Ib.* 1.

(*f*) *Ib.* 30.

(*g*) *Ib.* 38, 48.

(*h*) *Hutton v. Sandys*, 1 Younge, 602, see 607; *Smith v. Smith*, 2 Cr. & Mees. 231.

(*i*) *Foster v. Blackstone*, 1 M. & K. 297, see 307.

The principles upon which Sir T. Plumer proceeded were these. That "although the *cestui que trust* could not transfer the legal interest, which must remain with the executors, yet, wherever it was intended to complete the transfer of a *chose en action*, there was a mode of dealing which a Court of Equity considered tantamount to possession, viz., notice given to the legal depository of the fund. By such notice the legal holder was converted into a trustee for the new purchaser, and the *cestui que trust* was deprived of the power of carrying the same security repeatedly into the market. This precaution was always taken by diligent incumbrancers, and if it was not taken, there was neglect, and *the solicitor who conducted the business was responsible for that neglect*. To give notice was a matter of no difficulty, and wherever persons treating for a *chose en action* did not give notice to the trustee or executor, they did not perfect their title, they did not do all that was necessary to make the thing belong to them in preference to all other persons, and they became responsible in some respects for the easily foreseen consequences of their negligence (*k*). It was objected *qui prior est tempore potior est jure*; but it could not be contended that priority in time must decide where the legal estate was outstanding, for the maxim as an equitable rule admitted of exceptions, and gave way when the question did not lie between bare and equal equities. If there appeared to be, in respect of any circumstance independent of priority of time, a better title in the *puisne* purchaser to call for the legal estate than in the purchaser who preceded him in date, the case ceased to be a balance of equities, and the prefer-

(*k*) 3 Russ. 12—14.

ence, which priority of time might otherwise have given, was done away with and counteracted. What title had the prior incumbrancer to call on a Court of justice to interpose in his behalf, in order to obviate the consequences of his own misconduct? *He* had omitted to perfect his security: a third party had innocently advanced his money, and had perfected his security as far as the nature of the subject permitted, and was that Court to interfere to postpone him to the other? It was said notice did not form part of the necessary conveyance of an equitable interest. If a person meant to rely on the contract of the individual, there was certainly no need of notice, for from the moment of the contract he with whom the party was dealing was *personally* bound; but if it was meant to go farther, and attach a right upon the thing itself which was the subject of the contract, it *was* necessary to give notice, and if an individual who contracted with another did not by giving notice to the trustee divest the vendor or mortgagor of the possession, but permitted him to remain the ostensible owner as before, he must take the consequences which might ensue from such a mode of dealing (*l*)."

In *Smith v. Smith* (*m*) the notice by the first incumbrancer was given to *one* only of three trustees, and it was held he did not lose his priority. *Maberley*, being indebted to *Smith*, assigned to him by way of security his life-interest in certain funds under his marriage settlement, and afterwards became bankrupt. The assignee having mentioned his security to one of the trustees before the bankruptcy occurred, the question was, whether after such notice the fund was at the time of the bank-

(*l*) 3 Russ. 20—22.

(*m*) 2 Cr. & Mees. 231.

ruptcy in the power and disposition of the bankrupt, and it was determined in the negative. Lord Lyndhurst, in delivering the judgment of the Court, observed, "It was argued that notice to one only of three trustees is insufficient—that it should have been given to each of them, and that, this not having been done, the property remained in the order and disposition of the bankrupt up to the time of his bankruptcy; but we are of opinion that notice to one of the three trustees was sufficient: no valid assignment could have been made by the bankrupt after the notice to the trustee: a second assignee, in order to have obtained a priority over the first, must have shewn that he had exercised proper precaution in taking the assignment, that he had applied to the trustees to know if any previous assignment had been made, and unless he applied for this purpose to each of the trustees, he would not have exercised due caution, or done all that he ought to have done. But if he applied to each of the trustees, he would have been informed by one of them of the previous assignment to Smith, and he must then have taken the property, if at all, subject to the claim of Smith."

The only point positively determined in this case was, that if notice be given to one of three trustees, no second incumbrancer can gain a priority during the lifetime of that trustee: supposing it was the duty of the first incumbrancer to have given notice to each of the trustees, it was equally the duty of the second incumbrancer to have made inquiries of each of the trustees; and as both incumbrancers were guilty of negligence, or at least did not exert their utmost diligence, there was nothing to disturb the natural priority. But had the first incumbrancer contented himself with giving notice to *one* of

the trustees, and that trustee had *died*, and a second incumbrancer had made inquiries of the surviving trustees, and given them notice of his own assignment, then, it may be said, as the first incumbrancer did not do his utmost to guard against the fraud, and the second incumbrancer employed all the means in his power of detecting the fraud, the loss ought to fall on the person who had so far occasioned that he might have prevented it.

From the observation of Lord Lyndhurst, that "a second assignee, in order to obtain priority over the first, must shew that he has exercised proper precaution in taking the assignment,—that he has applied to the trustees to know if any previous assignment has been made," it seems to have been his Lordship's opinion, that if a prior incumbrancer neglected to give notice, but the second incumbrancer did not inquire, and therefore was not deceived, the maxim *qui prior est tempore potior est jure* ought to prevail; and this appears certainly the doctrine most consistent with principle. But in *Foster v. Blackstone* (n), before Sir J. Leach, and affirmed in the House of Lords, it was decided a second incumbrancer gains priority by the mere act of giving notice, whether he inquire or not. "A better equity," it was remarked, "is, where a second incumbrancer without notice takes a precaution against a subsequent incumbrancer, which the prior incumbrancer has neglected to take." Supposing this to be law, if a prior incumbrancer give notice to one only of three trustees, as in *Smith v. Smith*, and that trustee dies, and a second incumbrancer after the death of the trustee gives notice to the surviving trustees, but *makes no inquiries at the time of the assignment*, it may

(n) 1 M. & K. 297; and see *Timson v. Ramsbottom*, Append. No. 4.

still be questioned whether he does not gain the priority. The recent case of *Timson v. Ramsbottom* (o) seems actually to have decided in favour of the second incumbrancer. A testator appointed Bacon the elder, Timson, Ramsbottom the elder, and Ramsbottom the younger, his executors. In 1816 Ramsbottom the elder died. By indenture dated in 1819, and made between Bacon the younger of the one part, and Thomas Bacon (not the executor), Langford, and Walford of the other part, Bacon the younger, who took an interest under the will, assigned it to trustees upon trust for securing the repayment to Bacon the elder of 5000*l.* and interest. In 1827 Bacon the elder died, without having communicated the charge to his co-executors. In 1828 a bill was filed, and the testator's estate was brought into Court. By indenture, dated in 1832, Bacon the younger assigned the same interest to Corfield, who had no notice of the prior incumbrance and made no inquiries, for securing to Corfield the sum of 1000*l.* and interest. In 1833 a regular notice of the assignment was sent by Corfield to the surviving executors (p). Lord Langdale, in decreeing the priority of the second incumbrancer, observed, "None of the cases cited at the bar appear to me to be like the present—of a father and son having a transaction of this sort between themselves, the father being one of several executors—no allegation even that the other executors were informed before the notice was received from Corfield—no ground to presume that the transaction was communicated

(o) See Append. No. 4.

(p) The Master of the Rolls in his judgment states that notice was given to Timson, but his reason-

ing assumes, and the fact was, that notice was also given to Ramsbottom.

to the other executors, each of whom had separate authority to receive and pay on account of the estate, and who, if they had no notice of the assignment, might have made payment to the assignee without incurring any liability whatever on that account. I think, therefore, after, I admit, a good deal of hesitation, that the knowledge of one of several executors who were interested, and who does not appear to have communicated that knowledge to his co-executor, is not sufficient to create a trust in which the assignee has done nothing but accepted the assignment." A petition of appeal has been presented, and the cause, it is expected, will shortly be heard (*q*).

Should notice of an incumbrance be sent to *all* the trustees, and *all* should die, and then a second incumbrancer makes inquiries of the succeeding trustees who have no knowledge of the prior charge, and serves them with notice of the assignment to himself, in this case the second incumbrancer cannot possibly be thought to gain the priority over the first, for the first incumbrancer took every precaution in his power at the date of his charge, and it could hardly be expected he should watch every change in the trust, and send repeated notices to every succession of new trustees.

The notice, written or unwritten (*r*), but better written, may be given either to the trustees themselves or to their solicitors (*s*); and where notice to one trustee would be

(*q*) If heard before publication, the result will be subjoined in the Appendix. & C. 357, *per* Sir G. Rose; *S. C.* 1 Mont. & Ayr. 695, note, *per eundem*.

(*r*) *Smith v. Smith*, 2 Cr. & Mees. 231; *ex parte Carbis*, 4 D. & K. 297. (*s*) *Foster v. Blackstone*, 1 M. & K. 297.

sufficient, it may be given to one who is not the acting trustee (*t*). It may even be communicated to the trustee incidentally in the way of conversation, for the only point to be ascertained is, whether the existence of the charge has in fact come to the personal knowledge of the trustee (*u*). Where the trust fund consists of a share in a company, the notice may be sent to the secretary (*x*); but notice to A., a director, and B., the actuary, has been considered sufficient (*y*); and, in another case, notice to A., one of the directors, and B., an auditor (*z*). But incidental mention of the charge to a clerk of the company, though in the office of business, will not be constructive notice to the company itself (*a*).

If the trust fund be in court, an assignee should inquire at the Accomptant-General's and Registrar's offices to ascertain whether any order has been made restraining the transfer of the fund, or notice has been given of any prior incumbrance; and, on the completion of his own assignment, he should give notice to the trustees personally, and obtain an order restraining the transfer, and leave it at the Accomptant-General's office to be entered (*b*). But should an incumbrancer give notice to the trustees, but neglect to obtain an order, he will still take precedence of prior incumbrancers, who have neither obtained an order nor given notice, or who had given notice to

(*t*) *Smith v. Smith*, 2 Cr. & Chit. 87.

Mees. 233.

(*z*) *Ex parte Waithman*, 4 Deac.

(*u*) *Smith v. Smith*, 2 Cr. & Chit. 412.

Mees. 231, see 233.

(*a*) *Ex parte Carbis*, 4 Deac.

(*x*) *Ex parte Stright*, Mont. 502.

& Chit. 354; *S. C.* 1 Mont. & Ayr. 693, note (*a*).

(*y*) *Ex parte Watkins*, 1 Mont. & Ayr. 689; *S. C.* 4 Deac. &

(*b*) *Greening v. Beckford*, 5 Sim. 195.

one only of three trustees, and that trustee had died before the time of the second incumbrance: it is true the second incumbrancer did not adopt every precaution, but he resorted to one which the prior incumbrancer neglected: the first assignee either sent no notice, or one which, by the death of the trustee before the time of the second incumbrance, had become equivalent to no notice (c). Thus, at least, it was determined by Lord Langdale in the above-mentioned case of *Timson v. Ramsbottom*, but perhaps it was in allusion to this point as much as any that his lordship acknowledged he felt "a good deal of hesitation."

II. An equitable interest is transmissible by devise (d).

But the trust of a *freehold* can only be passed by a will in writing, signed by the testator and attested by three witnesses as required by the Statute of Frauds, for otherwise a door would be opened to all the mischiefs and inconveniences the statute was intended to prevent (e). Whether trusts are within the *letter* of the act, or equity has brought them under its operation by *analogy*, is not easy to determine (f); undoubtedly the word "lands" has often been extended to include trusts (g), and, if so, there seems to be little reason why

(c) *Timson v. Ramsbottom*, W. 259, per Lord Macclesfield; Append. No. 4. *Adlington v. Cann*, 3 Atk. 151,

(d) *Cornbury v. Middleton*, 1 Ch. Ca. 211, per Wyld, Just.; *per* Lord Hardwicke; *Burgess v. Wheate*, 1 Ed. 224, per Lord Mansfield.

(e) *per* Lord Harcourt; *Cole v. Moore*, Mo. 806, per cur.; *Phillips v. Brydges*, 3 Ves. 127, per Lord Alvanley. (f) See *Burgess v. Wheate*, ubi supra; *Wagstaff v. Wagstaff*, 2 P. W. 261.

(g) See supra, p. 483.

(e) *Wagstaff v. Wagstaff*, 2 P.

trusts should not be within the *express* terms of the statute.

Copyholds, strictly speaking, are not a devisable interest. A surrender is made to the use of the will, and the gift contained in the will operates as a declaration of the use. The devisee does not come in by the will, but by the surrender and the will taken together, as if the name had been inserted in the surrender itself (*h*). Thus copyholds at *law* are out of the Statute of Frauds, and may be devised by a will neither signed nor attested; and, as equity follows the law, the trust of a copyhold is devisable in the same manner (*i*). The equitable interest of a copyhold may even be devised, where the custom of the manor does not allow the transmission of the legal estate by will (*k*). The equitable interest might always have been passed by will, notwithstanding the want of a surrender (*l*); but at the present day a surrender is not necessary, even in respect of the legal estate (*m*).

The doctrines laid down as to copyholds have not been extended to *customary freeholds* (1). The determination as to copyholds was grounded on the circum-

(*h*) *Hussey v. Grills*, Amb. 300, v. *Wagstaff*, 2 P. W. 261.

per Lord Hardwicke.

(*k*) *Lewis v. Lane*, 2 M. & K.

(*i*) *Appleyard v. Wood*, Sel. 449.

Ch. Ca. 42; *Wagstaff v. Wagstaff*,

2 P. W. 258; *Tuffnell v. Page*,

2 Atk. 37; and see *Attorney-*

General v. Andrews, 1 Ves. 225;

but see *Anon. case*, cited *Wagstaff*

(*l*) *Greenhill v. Greenhill*, 2

Vern. 679; *Tuffnell v. Page*, 2

Atk. 37; *Gibson v. Rogers*, Amb.

93.

(*m*) By 55 G. 3, c. 192.

(1) A copyhold is where the freehold is in the lord, and the copyholder's estate passes by surrender. A customary freehold is where the tenure is copyhold, but the freehold interest is in the tenant, and passes by deed. See *Bingham v. Woodgate*, 1 R. & M. 32; *S. C.* Taml. 183.

stance that the interest passed, not by the will, but by the surrender; but customary freeholds are strictly and properly speaking devisable, the estate passing by the will. The *legal* estate of customary freeholds has, therefore, not been excepted from the Statute of Frauds (*n*); and, of course, a devise of the *equitable* interest must be attended with the same formalities as if it were a devise of the legal (*o*).

III. Of seisin and disseisin of a trust.

The term *seisin* is properly applicable to legal estates, but a court of equity regards actual receipt of the rents and profits under the equitable title as equivalent to *seisin* at law, and has often adjudicated upon the rights of parties with reference to that circumstance.

Thus, in *Casborne v. Scarfe* (*p*), it was disputed, whether, as curtesy did not attach at law without a *seisin* in fact, the husband could claim his curtesy out of the wife's equity of redemption; but Lord Hardwicke said, "It is objected there is no *seisin* whatever of the legal estate in the wife in the consideration of law; but that is not the present question: the true question is, if there was such a *seisin* or possession of the equitable estate in the wife, as in this Court is considered equivalent to an actual *seisin* of a freehold estate at common law; and I am of opinion there was. Actual possession, clothed with the receipt of the rents and profits, is the highest instance of an equitable *seisin*, both of which there were in this case."

And so it has been held there is *possessio fratris* of

(*n*) *Hussey v. Grills*, Amb. 299; *Willan v. Lancaster*, cited Id. 301, note (2), Blunt's ed.; and see *Doe v. Danvers*, 7 East, 299.

(*o*) *Hussey v. Grills*, *ubi supra*; *Willan v. Lancaster*, 3 Russ. 108.
(*p*) 1 Atk. 603.

a trust, in other words, that if a person inherit a trust and die before actual *seisin* of the estate, it shall descend to the brother of the half blood, as heir to the father, in preference to the sister of the whole blood; but if there was such a receipt of the rents and profits as constitutes equitable *seisin*, the sister of the whole blood, as heir to the brother, will exclude the brother of the half blood.

The doctrines of the Court upon the subject of equitable *disseisin* cannot be better illustrated than by a statement of the well-known case of *The Marquis of Cholmondeley v. Lord Clinton* (q). The circumstances were briefly as follows:—George, Earl of Orford, conveyed certain manors and hereditaments to the use of himself for life, remainder to the heirs of his body, remainder as he should by deed or will appoint, remainder to the right heirs of Samuel Rolle, with a power reserved of revocation and new appointment. Some time after the Earl executed a mortgage in fee, which operated in equity as a revocation of the settlement *pro tanto*. In 1791 the Earl died without issue and intestate, and upon his death the ultimate remainder (which had been a vested interest in the Earl himself, as the heir of Samuel Rolle at the date of the deed,) should have descended to the right heir of the Earl, but, the parties having mistaken the law, the person who was heir of Samuel Rolle at the death of the Earl was allowed to enter on the premises, and continued in possession, subject to the mortgage, up to the commencement of the suit. The bill was filed in 1812, by the assign of the right heir of the Earl against the mortgagee, and the assign of the right heir of Samuel Rolle, for redemption of the premises, and an account of the profits. It was

(q) 2 Mer. 171; 2 J. & W. 1.

debated whether, as the legal estate was vested in the mortgagee, and the heir of Samuel Rolle had held the possession subject to a subsisting mortgage, the assign of the Earl of Orford's heir, to whom the equity of redemption belonged in point of *right*, had been disseised of his equitable interest, and was now barred by the effect of time. Sir W. Grant argued, that "although there might be what was deemed a *seisin* of an equitable estate, there could be no *disseisin*, first, because the *disseisin* must be of the entire estate, and not of a limited and partial interest in it—the equitable ownership could not possibly be the subject of disseisin; and, secondly, because a tortious act could never be the foundation of an equitable title: that an equitable title might undoubtedly be *barred* by length of time, but could not be *shifted* or *transferred*. It was admitted in the present case the equity of redemption subsisted; it must therefore belong to some one, and could only belong to the original *cestui que trust* (*r*). That so long as the trust subsisted, so long it was impossible that the *cestuis que trust* could be barred. The *cestuis que trust* could only be barred by barring and excluding the estate of the trustee (*s*)." Sir W. Grant did not then decide the point, but directed a case for the opinion of the King's Bench on a question of law, and retained the bill till the judges' certificate should be returned.

The cause was afterwards reheard on the equity reserved before Sir T. Plumer, who determined that the original *cestui que trust* had been disseised, and was consequently barred (*t*). "The grounds," he said, "upon which it is contended that the holder of the rightful

(*r*) 2 Mer. 357—9.

(*t*) 2 J. & W. 1.

(*s*) Ib. 361.

equity is not bound by *laches* and nonclaim are, that the tortious possessor does not claim to be the owner of more than the equitable estate—the legal estate remains unbarred: that there is no disseisin abatement or intrusion of a trust—the possessor is only tenant at will, and may be dispossessed at any time by the trustee of the legal estate—he has therefore only a precarious and permissive possession: that tortious possession can never be the foundation of an equitable title (*u*). But this reasoning proceeds on a mistaken view of the manner in which, and the grounds upon which, the bar from length of time operates. The question respects the plaintiff's right to the remedy, not the defendant's title to the estate. A tortious act can never be the foundation of a *legal* any more than of an *equitable* title. The question is, whether the plaintiff has prosecuted his title in due time. The quiet and repose of the kingdom, the mischief arising from stale demands, the *laches* and neglect of the rightful owner, and all the other principles of public policy take away the remedy, notwithstanding the title *veri domini*, and the tortious holding of the possessor (*v*). As to the argument that a title in a Court of equity may be *lost* by *laches*, but cannot be *transferred* without the act of the party, the case is the same in this respect both in equity and law. The title is changed in both by the operation of a public law upon public principles without regard to the original private right. If the negligent owner has for ever forfeited by his *laches* his right to any remedy to recover, he has in effect lost his title for ever. What, then, is to become of the title, whether legal or equitable? Is it to become *hæreditas jacens*, belonging to no one? Is it to devolve on the crown, or

(*u*) 2 J. & W. 153.

(*v*) *Ib.* 155.

to pass by escheat? The plaintiff is barred of his remedy: the defendant keeps possession without the possibility of being ever disturbed by any one: the loss of the former owner is necessarily his gain; it is more—he gains a positive title under the statute at law, and, by analogy, in equity (x). If the mere existence of an old legal estate would have the effect of preventing the bar attaching upon the equitable estate, all the principles that have been established respecting equitable estates and titles would be overturned. According to this reasoning, whenever the legal estate is outstanding, in an old term, for instance, to attend the inheritance, the earliest equitable title must in all cases prevail: quiet enjoyment for 60, 100, or 200 years or more would be no security, if the old term had existed longer: it would always be open to inquiry in whom was vested the equitable title which originally existed when the old term was created (y).”

On appeal to the House of Lords his Honor’s decision was affirmed, and the principle on which it proceeded was approved. Lord Eldon said, “the connection between the legal estate in the term and the equities of the persons entitled to the inheritance was by no means indissoluble;” and he instanced the case of a second mortgagee, without notice of the incumbrance of the first, getting in an outstanding term by which he shifted to himself the equity that was previously in the first. “He could not agree, and had never heard of such a rule as that adverse possession, however long, would not avail against an equitable estate: his opinion was, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming

(x) 2 J. & W. 155, 156.

(y) *Ib.* 157.

the same equity of redemption, and *worked the same effect as abatement or intrusion with respect to legal estates, and that for the quiet and peace of titles and the world it ought to have the same effect (z).*"

IV. Of dower and curtesy.

A trust (*a*), or equity of redemption (*b*), of freeholds, or *copyholds* (*c*), is exempt from the *lien* of dower and freebench, but is subject to the curtesy of the husband (*d*).

In *Banks v. Sutton* (*e*), a case of *dower*, Sir J. Jekyll took a distinction between trusts created by the husband himself, and trusts originating from a stranger; that in the former case the wife should *not* be dowable, for it might reasonably be supposed the husband had intended to bar her dower, but in the latter case there was no ground for such a presumption, and therefore the title to dower should attach. His Honor, however, did not rest his decision upon this distinction (*f*), and in subsequent cases the refinement has been rejected (*g*).

(z) *Ib.* 190, 191.

521.

(a) *Colt v. Colt*, 1 Ch. Re. 254; *Bottomley v. Lord Fairfax*, Pr. Ch. 336; *Attorney-General v. Scott*, Rep. t. Talb. 138; *Chaplin v. Chaplin*, 3 P. W. 229; *Shepherd v. Shepherd*, Id. 234, note (D); *Curtis v. Curtis*, 2 B. C. C. 630, per Lord Alvanley; *Lady Radnor v. Rotheram*, Pr. Ch. 65, per Lord Somers; *Godwin v. Winsmore*, 2 Atk. 525.

(b) *Dixon v. Saville*, 1 B. C. C. 326; *Reynolds v. Messing*, cited *Casborne v. Scarfe*, 1 Atk. 604.

(c) *Forder v. Wade*, 4 B. C. C.

(d) *Chaplin v. Chaplin*, 3 P. W. 234, per Lord Talbot; *Attorney-General v. Scott*, Rep. t. Talb. 139, per eundem; *Watts v. Ball*, 1 P. W. 108; *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 1 Ves. 174; *Casborne v. Scarfe*, 1 Atk. 603.

(e) 2 P. W. 700.

(f) *Ib.* 715.

(g) See *Curtis v. Curtis*, 2 B. C. C. 630; *D'Arcy v. Blake*, 2 Sch. & Lef. 391; *Godwin v. Winsmore*, 2 Atk. 526; *Burgess v. Wheate*, 1 Ed. 197.

With respect to *curtesy*, it has been already observed, that as at law the wife, to entitle her husband to curtesy, must have had *seisin* in deed of the freehold, so in the instance of a *trust* there must have been such a *seisin* of the equitable estate in the wife, as is considered equivalent to *seisin* at law, as actual possession of the estate clothed with the receipt of the rents and profits (*h*). If the trust be for the *separate use* of the wife, so that her *seisin* would not entitle her husband to the possession or profits, it was formerly doubted whether in this case curtesy was not excluded. Lord Hardwicke was originally in favour of the curtesy (*i*), but in a subsequent case (without alluding, however, to his former opinion,) he decided against the claim of the husband (*k*). It has since been determined by Sir J. Leach that the husband is entitled (*l*).

It must be acknowledged on all hands, that, as dower and curtesy stand exactly on the same footing upon principle, either the rejection of dower, or the admission of curtesy, must be considered an anomaly. Some high authorities, as Lord Talbot (*m*), Sir T. Clarke (*n*), and Lord Loughborough (*o*), have regarded *curtesy* as the exception; and the ground upon which they proceed is, that as trusts follow the likeness of the use, and there was no curtesy of the use, there can be none of the trust. On the other hand, Sir J. Jekyll (*p*), Lord Cow-

(*h*) *Cashorne v. Scarfe*, 1 Atk. 603, see 606.

(*i*) *Roberts v. Dixwell*, 1 Atk. 609.

(*k*) *Hearle v. Greenbank*, 3 Atk. 715, 716.

(*l*) *Morgan v. Morgan*, 5 Mad. 408.

(*m*) *Chaplin v. Chaplin*, 3 P.

W. 234; *Attorney-General v. Scott*, Rep. t. Talb. 139.

(*n*) *Burgess v. Wheate*, 1 Ed. 196—198.

(*o*) *Dixon v. Saville*, 1 B. C. C. 327.

(*p*) *Banks v. Sutton*, 2 P. W. 713, 714.

per (*q*), Lord Mansfield (*r*), Lord Henley (*s*), and Lord Redesdale (*t*), have thought that consistency would be restored by the admission of the title to *dower*; for, since the Statute of Frauds, they argue, the system of trusts has undergone considerable alterations, and is conducted at present upon a much more liberal footing: the rule now is, that, as between the *cestui que trust* and the trustee and all claiming by or under them, whoever would have a right against the legal estate has the like right against the equitable. Thus either argument has a fair shew of reason to support it, but the latter, as it appears, is most in accordance with general principles.

Why the Courts should have been induced to leave *dower* an exception, has been accounted for, not more ingeniously than satisfactorily, by Lord Redesdale:—"The courts of equity," he said, "had assumed as a principle in acting upon trusts to *follow the law*; and, according to this principle, they ought in all cases where rights attached on legal estates to have attached the same rights upon trusts, and consequently to have given *dower* of an equitable estate. It was found, however, that in cases of *dower* this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting on the footing of *dower* upon a contrary principle—that by the creation of a trust the right of *dower* would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion, if courts of equity had followed their

(*q*) *Watts v. Ball*, 1 P. W. 109. (*t*) *D'Arcy v. Blake*, 2 Sch. &

(*r*) *Burgess v. Wheate*, 1 Ed. 224. Lef. 388.

(*s*) *Ib.* 249—251.

general rule with respect to trusts in cases of dower. But the same objection did not apply to *tenancy by the curtesy*; for no person would purchase an estate subject to tenancy by the curtesy without the concurrence of the person in whom that right was vested. Pending the coverture, a woman could not aliene without her husband, and therefore nothing she could do would be understood by a purchaser to affect his interest. But when the husband was seised or entitled in *his own right*, he had full power of disposing, except so far as dower might attach; and the general opinion having long been that dower was a mere legal right, and that, as the existence of a trust estate previously created prevented the right of dower from attaching at law, it would also prevent the property from all claim of dower in equity, and many titles depending on this opinion, it was found that it would be mischievous, in this instance, to act on the general principle (*u*)."

Now, by a late act (*x*), the title of dower attaches on an equitable, in the same manner as on a legal estate; but in either case the husband has power to defeat the right of the wife, either by alienation in his lifetime, or by devise or other declaration of intention contained in his will. However, the act does not affect the dower of any widow who was married on or before the 1st day of January, 1834; and the saving of the proviso seems to extend even to estates purchased by the husband subsequently to that period.

V. Of the effect of marriage upon a feme's equitable chattels.

(*u*) *D'Arcy v. Blake*, 2 Sch. & Lef. 388. (*x*) 3 & 4 W. 4, c. 105.

The effect of marriage is the same upon legal as upon equitable interests: therefore, as the husband may assign the *chattels real* of the wife at law, so he may assign her trust of a term in equity (*y*), though it be merely a contingent interest (*z*); and, of course, without the concurrence of either the wife or the trustee, without consideration, and without any claim of the wife to a settlement. And this doctrine has not been interfered with by the case of *Purdew v. Jackson* (*a*); for a trust is not, as it was formerly held, a *chose in action*, but a present interest, an estate in possession (*b*).

If a judgment be acknowledged to A. in trust for a *feme sole*, and she marries, and the conusee of the judgment sues an *elegit*, and possession of the lands is delivered to him in trust for the wife, the husband may assign the extended interest, as he might have assigned the trust of a term certain (*c*); and the law is the same where the *feme* is put in possession of lands by a decree of the Court of Chancery until a certain sum be raised by way of *equitable elegit* (*d*).

And it has been held that a mortgage term in trust

- (*y*) *Roupe v. Atkinson*, Bunb. 162; *Mitford v. Mitford*, 9 Ves. 99, *per* Sir W. Grant; *Packer v. Wyndham*, Pr. Ch. 418, 419, *per* Lord Cowper; *Franco v. Franco*, 4 Ves. *528, *per* Lord Alvanley; *Bullock v. Knight*, 1 Ch. Ca. 266, *per* Lord Nottingham; *Sanders v. Page*, 3 Ch. Re. 223, *per cur.*; *Macaulay v. Philips*, 4 Ves. 19, *per* Lord Alvanley; *Wikes's case*, Lane, 54, *per* Barons Snig and Altham; *S. C.* Roll. Ab. 343; *Jewson v. Moulson*, 2 Atk. 421, *per* Lord Hardwicke; *Incedon v. Northcote*, 3 Atk. 435, *per eundem*.
 (*z*) *Donne v. Hart*, 2 R. & M. 360.
 (*a*) 1 Russ. 1.
 (*b*) See *Mitford v. Mitford*, 9 Ves. 98, 99; *Holland's case*, Style, 21; *Burgess v. Wheate*, 1 Ed. 223, 224.
 (*c*) *Lord Carteret v. Paschal*, 3 P. W. 201, *per* Lord King.
 (*d*) *S. C.* Ib. 197.

for the wife (*e*), or a term in trustees for raising a portion for her (*f*), may be assigned by the husband so as to carry the beneficial interest. But in these cases the debt or portion is the principal thing; and as it is now settled that a *chose en action* of the wife is not disposable by the husband, the doctrine appears to be doubtful.

A second husband may assign the trust of a term limited to the separate use of a *feme* upon her first marriage, or during her first coverture (*g*). It was held, indeed, by Lord Nottingham in *Sir Edward Turner's* case (*h*), that a term thus limited could not be disposed of by the husband; but the decree, it is said, originated in mistake (*i*), and was reversed in the House of Lords on appeal (*k*).

A term assigned by a *feme* in trust for her separate use before her marriage *without the knowledge* of her intended husband is subject to his disposition on the ground of fraud upon the marital rights (*l*); but if *with his privity*, it was formerly held, the trust for the separate use would be good (*m*); but a subsequent case decided, that even privity would not exclude the hus-

(*e*) *Bates v. Dandy*, 2 Atk. 207; Vern. 17.

Packer v. Wyndham, Pr. Ch. 412, see 418. (*h*) 1 Ch. Ca. 307.

(*f*) *Waller v. Saunders*, 1 Eq. Ca. Ab. 58; *Ingleton v. Northcote*, 3 Atk. 430, see 435; see *Mitford v. Mitford*, 9 Ves. 99. (*i*) See *Sanders v. Page*, 3 Ch. Re. 224; but see *Pitt v. Hunt*, 1 Vern. 18.

(*g*) *Tudor v. Samyne*, 2 Vern. 270; *Barton v. Briscoe*, Jac. 603; *Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, Ib. 126; and see *Howard v. Hooker*, 2 Ch. Re. 81; *Edmonds v. Dennington*, cited *Carleton v. Earl of Dorset*, 2

(*k*) 1 Vern. 7.

(*l*) *Draper's case*, Freem. 29, *per cur.*; and see *Carleton v. Earl of Dorset*, 2 Vern. 17; *Howard v. Hooker*, 2 Ch. Re. 81.

(*m*) *Doyly v. Perfull*, 1 Ch. Ca. 225; *Draper's case*, Freem. 29; *Sir E. Turner's case*, 1 Vern. 7.

band's right, unless he had also bound himself by express contract (*n*). And the Statute of Frauds, we must remember, requires an agreement in consideration of marriage to be in writing and signed (*o*).

So if a term be given by deed or will upon trust for the separate use of a *feme* who at the time of the gift is *discovert*, if the *feme* afterwards marry, and there be no contract or settlement affecting the term, the husband may, it seems, dispose of it, as he might of any other chattel of which the *feme* had the entire and absolute possession (*p*).

If after marriage, and without consideration, a husband limit a term in trust for the wife and the heirs of her body (which vests in her the absolute interest), he cannot, should he survive his wife, claim it again to his own use (*q*). But he may sell the term, and the settlement, being voluntary, will be void as against a purchase for valuable consideration (*r*).

VI. Of judgments against the *cestui que trust*.

Before entering upon this topic, it may be useful to notice briefly how *legal* interests stand affected by judgments.

At *common law* the plaintiff in the action had only two writs of execution open to him against the property of the defendant: the *fieri facias*, to levy the debt *de bonis et catallis*; and the *levari facias*, to levy it *de terris et catallis* (*s*). The execution under the latter writ affected

(*n*) *Pit v. Hunt*, 2 Ch. Ca. 73; Re. 223.

S. C. Freem. 78; *S. C.* 1 Vern. 18.

(*o*) 29 Car. 2, c. 3, s. 4.

(*p*) See *supra*, p. 151.

(*q*) *Sanders v. Page*, 3 Ch.

(*r*) *Doyly v. Perfull*, 1 Ch. Ca. 225, and *Turner v. Bromfield*, Ib.

308, *per* Lord Nottingham.

(*s*) *Finch's Law*, 471.

not the *possession* of the lands (*t*), but merely enabled the sheriff, besides taking the chattels, to levy the debt from the present profits, as from the rents payable by the tenants (*u*), and the emblements (*x*), that is, the corn and other crops at the time growing on the lands (*y*). If the sheriff, when he made his return, had not levied the full amount of the debt, a new *levari facias* might have issued, to be executed by the sheriff in the same manner (*z*) (1).

In order to provide for the creditor a more effectual remedy, the Statute of Westminster (*a*) introduced the writ of *elegit*, and enacted, that when debt was recovered or knowledged, or damages awarded, the suitor

(*t*) Id. 471; *Sir E. Coke's case*, Godb. 290. (*y*) *Harbert's case*, 3 Re. 11. b; 2 Inst. 394; 2 Bac. Ab. Exe-

(*u*) Finch's Law, 472; *Davy v. Pepys*, Plowd. 441. cution (C) 4, note (*b*).
(*z*) F. N. B. 265.

(*x*) 4 Com. Ab. 118. (*a*) 13 Ed. 1, st. 1, c. 18.

(1) There was also another species of *levari facias*, of which the plaintiff might, under particular circumstances, have indirectly availed himself. In case the defendant was outlawed in the action, the sheriff, on the issuing of the *capias uslegatum*, took an inquisition of the lands of the debtor, and extended their value, and made his return to the Exchequer. A *levari facias* from the crown then followed, commanding the sheriff to levy the extended value *de exitibus*, from the *issues* of the lands, till the plaintiff should be satisfied his debt. These issues were defined to be the "rents and revenues of the land, corn in the grange, and all moveables, except horse harness and household stuff." 13 Ed. 1, c. 39, st. 1; 2 Inst. 453. The sheriff might have agisted or mown the grass. *Britten v. Cole*, 5 Mod. 118, *per* Lord Holt. But if, at the date of the inquisition, the agistment was already let, the money agreed to be paid was a sum *in gross*, and was not subject to the *levari facias*. *S. C.* 1 Raym. 307, *per eundem*. The cattle of a stranger, if *levant and couchant* on the land, were seizable under the writ, as included in the word "issues." *S. C.* 1b. 305. The lands were bound by the *levari facias* from the date of the writ, so that any subsequent disposition, though it served to pass the freehold and possession, yet did not interrupt the king's title to the profits. *Ib.* 307, *per* Lord Holt.

should at his *choice* (b) have a writ of *fieri facias* (c) from the debtor's lands and chattels, or that the sheriff should deliver to him all the chattels of the debtor, except his oxen and beasts of the plough, and *one-half of his land, until the debt should be levied upon a reasonable price or extent.*

It is by virtue of this statute, which has never been repealed or altered, that judgment creditors are enabled at the present day to sue execution of the debtor's lands to the extent of *one moiety*.

With this outline of the effect of judgments at *law*, we come to the inquiry, what is the effect of judgments upon interests in *equity*?

First, with respect to the *fieri facias*, it is clear that under the system of *uses* no relief could have been granted; for the creditor, coming in by operation of law, did not possess that *privity* of estate which could alone confer upon him the right to sue a *subpœna*. During the earlier period of *trusts* the same technical notions prevailed; but Lord Nottingham introduced a more liberal principle, and established, what is now law, that a creditor, who was prevented from executing the legal process by the interposition of a trust, might come into Chancery and prosecute an *equitable fieri facias* (d).

But, as the analogy to law must be strictly pursued, the trust of a chattel cannot be attached in equity until the writ of execution has been actually sued out; for till that time there is no *lien* upon the debtor's effects, which is the very ground of the application (e). And as equity

(b) Whence the term *elegit*.

Anon. case, cited Balch v. Wastall,

(c) In these words the legislature meant to include the two writs of *fieri facias* and *levari facias*. 2 Inst. 395.

1 P. W. 445; and see *Scott v. Scholey*, 8 East, 485.

(e) *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200.

(d) *Pit v. Hunt*, 2 Ch. Ca. 73;

only follows, and does not enlarge the law, the judgment creditor has no title to relief where the chattel, of which the trust has been created, is not in itself amenable to any legal process. An opinion, indeed, is subjoined to the case of *Horn v. Horn* in Ambler (*f*), that a trust of stock may be taken by a judgment creditor in equitable execution; and *Taylor v. Jones* (*g*), before Sir W. Fortescue; M. R., was even a decision to the same effect: but such a doctrine, as stock cannot be reached at law, is clearly contrary to all principle, and has since incurred the express disapprobation of Lord Thurlow (*h*); Lord Mansfield (*i*), Sir Archibald Macdonald (*k*), and Lord Eldon (*l*); Lord Thurlow observing, that the opinion in *Horn v. Horn* was so anomalous and unfounded, that forty such would not satisfy his mind (*m*).

The judgment creditor is of course equally relievable (subject to such restrictions as we have mentioned,) against the equity of redemption of a chattel (*n*).

As regards the *levari facias*, a court of equity would, it is presumed, as in the instance of the *fieri facias*, assist in the execution of it where obstructed by the interposition of a trust; but the writ being a *lien* at law, not upon the lands, but only on the present profits of the lands, a

(*f*) Amb. 79.

(*g*) 2 Atk. 600; and see a note of S. C. in *Grogan v. Cooke*, 2 B. & B. 233.

(*h*) *Dundas v. Dutens*, 2 Cox, 240.

(*i*) *Grogan v. Cooke*, 2 B. & B. 233; and see the same doctrine doubted by Sir W. MacMahon in *Plasket v. Lord Dillon*, 1 Hog. 328.

(*k*) *Caillaud v. Estwick*, 2 Anst. 384.

(*l*) *Rider v. Rider*, 10 Ves. 368.

(*m*) *Grogan v. Cooke*, 2 B. & B. 233.

(*n*) *King v. Marissal*, 3 Atk. 192; *Shirley v. Watts*, Ib. 200; *Burdon v. Kennedy*, Ib. 739; and see *King v. De la Motte*, Forr. 162.

court of equity could not go farther and affect either the *freehold* or the *possession*.

The *elegit* owing its origin to a statute, a doubt may suggest itself *in limine*, whether, when the legislature has passed an enactment against the *legal estate*, a court of equity can, consistently with its general principles, apply by analogy the same provision to the case of a trust. A legal estate, for example, was by act of parliament made forfeitable without inquest for treason, and, as the statute enumerated "uses," it was contended, and seems to be established, that trusts have also under that expression become forfeitable to the Crown; but it was never pretended that, had "uses" not been inserted in the act, a court of equity could have subjected trusts to forfeiture by any inherent jurisdiction of its own. It must be remarked, however, that the act which originated the *elegit* was, like the statute *de donis*, prior to the introduction of the use; and as equity, by analogy to the Statute of Westminster, has admitted entails and remainders of trusts, why may it not, by analogy to another act of the same statute, allow equitable interests to be affected by judgments?

It would seem from the following case, that in Lord Keeper Bridgman's time a trust was not subject to an *elegit*.

Colt, a *cestui que trust* in fee, had confessed a judgment to Sir George Pratt for 1,000*l*. Colt died, and Sir George filed a bill against the heir, praying an extent upon the judgment. It was argued for the plaintiff, that if the trust had been a term of years, and had come to the executor, it had been assets in his hands, and why not in this case, when the defendant claimed as heir? But

the Lord Keeper allowed the defendant's demurrer, saying, "The executor claimed *en autre droit*, but the heir to his own use(o)." In this case the *lien* of a judgment must be carefully distinguished from a bond debt. The latter is a debt upon the heir himself, and may be recovered against him to the extent of the assets descended; but a judgment is not a debt against the heir, but a specific *lien* upon the estate(p). The question, therefore, before the Lord Keeper was, not whether a trust estate should be assets, but whether a judgment, which bound a moiety of the lands at law, should in equity be a *lien* to the same extent upon a trust; and the Lord Keeper, by allowing the defendant's demurrer, must have considered it was not a *lien*. However, the reporter remarks, that "the demurrer had not been taken as good by the old and best practitioners; for at law the heir was as much chargeable with the ancestor's judgment as the executor with the testator's debts, and equity ought to follow the law."

The liberality of modern times has since adopted the reporter's suggestion. It was long ago established that a judgment creditor might redeem a mortgage in fee(q),

(o) *Pratt v. Colt*, Freem. 139. "There seems to be a diversity between the case of the executor and of the heir, for in debt against the executor nothing shall be put in execution but the goods of the deceased; and the reason is because the debt is *not the debt of the executor, but of the testator, so that he is charged in another's right, and has the goods in another's right*. But where the heir has assets, the debt of his ancestor is become *his own debt in respect of the assets*

which he has in his own right, and the writ against him is in the *debet* and *detinet*." *Davy v. Pepys*, Plowd. 440.

(p) See *Stileman v. Ashdown*, 2 Atk. 608.

(q) *Greswold v. Marsham*, 2 Ch. Ca. 170; *Crisp v. Heath*, 7 Vin. Ab. 52; (The former case has been compared with Reg. Lib., A. 1685, f. 399, and the report appears substantially correct: the latter case has not been found.) *Plucknett v. Kirke*, stated from R. L. *supra*;

and it now seems to be settled that he may prosecute his *elegit* against any other equitable interest (r).

Davidson v. Foley (s), and *Plasket v. Dillon* (t), were cases of a *legal elegit*, but may be usefully noticed to prevent misapprehension. In the former case, Lord Foley had devised an estate to trustees for a term of 99 years upon certain trusts, and, subject thereto, to Thomas Foley for life, with remainders over. His Lordship had also devised other estates to trustees for a term of 101 years, and, subject thereto, to Thomas Foley for life, &c. as before. Judgments were entered up against Thomas Foley, and the trusts of the terms having been satisfied, and the beneficial interest resulting to the tenant for life, the creditors sued out *elegits*, and filed a bill praying to have the terms declared attendant on the inheritance, and that the trustees might be restrained from setting up the terms at law. The warrants of attorney on which the judgments were grounded were afterwards discovered to be void; but Lord Thurlow, in dismissing the bill, observed, "All he could gather from the cases was, that where the Court could see there was a good judgment, it would not stop without aiding that title by what was called an *equitable elegit*, but he could not carry it higher than that. The *æquitas sequens legem* must be such as

Sharpe v. Earl of Scarborough, 4 Ves. 538, and the cases cited lb. 541; *Stileman v. Ashdown*, 2 Atk. 477; *Fothergill v. Kendrick*, 2 Vern. 234; and see *Steele v. Phillips*, 1 Beat. 188; *Forth v. Duke of Norfolk*, 4 Mad. 503; *King v. De la Motte*, Forr. 162; and see *Freeman v. Taylor*, 3 Keb. 307. (r) *Forth v. Duke of Norfolk*, 4 Mad. 504, per Sir J. Leach; Serj. Hill's opinion, lb. 506, note (a); *Foster v. Blackstone*, 1 M. & K. 311, per Sir J. Leach: and see *Lodge v. Lyseley*, 4 Sim. 70. (s) 2 B. C. C. 203; 3 B. C. C. 598. (t) 1 Hog. 324.

to assure the Court the case was such as it could be followed by a legal execution; but where it appeared the judgment could not be followed by a *legal elegit*, the Court could not follow it by an *equitable elegit*."

In *Plasket v. Dillon*, Lord Dillon, the tenant for life, had demised an estate to trustees for 99 years, if he should so long live, upon trust, after discharging certain incumbrances, to pay to himself for life an annuity of 5,000*l.*, and, subject thereto, upon certain trusts for his creditors. A judgment was afterwards entered up against him, and an *elegit* sued out, but as there was no beneficial interest upon which the *elegit* could operate at law, the judgment creditor filed a bill to attach the rent-charge of 5,000*l.* a year in equity. Sir William MacMahon said, "The rule of law is, that the freehold property of the debtor shall be liable to the demands of his judgment creditors. Lord Dillon insists that the magical operation of a voluntary deed shall clear it from all incumbrances. If the statute of uses had executed the trusts of this deed, Lord Dillon's interest would have been extendible, and the interposition of a trust cannot exempt it in this Court (*u*)."^(u) His Honor's decision in favour of the judgment creditor was affirmed on appeal by Lord Manners, and afterwards, on a further appeal, by the House of Lords (*x*).^(x)

These then were cases of a judgment creditor having a *legal elegit*, and seeking to remove an impediment to the *legal execution* of it; but in *Tunstall v. Trappes* (*y*)^(y) the *elegit* was, strictly and properly speaking, equitable. By an indenture of 1811, Trappes appointed an estate

(*u*) 1 Hog. 328.

(*x*) 2 B. N. R. 239.

(*y*) 3 Sim. 286; and see *Lewis v. Lord Zouche*, 2 Id. 388.

to the use that Davis should receive an annuity, and, subject thereto, to the use of Withy and his heirs, upon trust in the first place to secure the annuity, and then in trust for Trappes. In 1812 a judgment was entered up against Trappes by Sir Henry Lawson. In the beginning of the year 1814 Trappes proposed to one Cranmer, that Cranmer should pay off Davis's annuity, and several incumbrances which were prior to it, and take a mortgage of the property for securing the advances he should thus make. On the 1st July, 1814, Cranmer paid off Davis's annuity, and took a conveyance of the legal estate from Withy to himself in fee, by way of security for the monies advanced and to be advanced. He afterwards paid off several charges prior to the annuity, and took assignments of the terms by which they were secured in the names of trustees. It was proved that Cranmer had notice of the judgment some time between the 1st and 11th days of July, 1814, and with such notice had continued to make advances to a very considerable amount. The question was, whether Cranmer was bound by the judgment, and if bound at all, then to what extent. The Vice-Chancellor decided that Cranmer was entitled to priority over the judgment creditor in respect of the sums paid by him for procuring the assignments of the *prior* charges, and for redeeming the annuity, *those incumbrances having been created prior to the time when Cranmer had notice of the judgment*; but that his claim in respect of the monies advanced by him subsequently to that period should be *postponed to the judgment*. In other words, the trust estate was bound by the judgment in the hands of a purchaser with notice, where he could not protect himself under the assignment of a prior charge.

The present doctrines of the Court have been well expressed by Sir J. Leach. "A judgment-creditor," he said, "has at law by the Statute of Frauds execution against the equitable freehold estate of the debtor in the hands of his trustee (z), provided the debtor has the whole beneficial interest; but if he has left a partial interest only in his equitable freehold estate, the judgment creditor has no execution at law, though he may come into a court of equity, and claim there the same satisfaction out of the beneficial interest, as he would be entitled to at law if it were legal. Every *voluntary assignee* of this equitable interest of the debtor will be in the same situation, with respect to the claim of the judgment creditor, as the debtor himself was. Every *assignee for valuable consideration* will hold the equitable interest discharged of the claim of the judgment creditor, unless he has notice of it (a)."

An estate given to trustees upon trust to be converted into personalty has in equity all the properties of personalty, and is therefore not bound by a judgment against the person to whom the proceeds of the sale are to be paid.

Thus in *Foster v. Blackstone* (b) estates were conveyed by the Duke of Marlborough to trustees in fee upon trust, if the said trustees *should in their discretion think proper but not otherwise*, to raise any sum of money for satisfaction of any debts due and owing from his son, the Marquis of Blandford, which the trustees should consider advisable to be paid; and to pay the surplus, if

(z) As to the operation of the Statute of Frauds, see *infra*, p. 541. (b) 1 M. & K. 297.
(a) *Forth v. Duke of Norfolk*, 4 Mad. 504.

any, of such monies as should be raised in the lifetime of the Duke unto the Duke, and the surplus of such as should be raised after his decease unto the Marquis of Blandford; and, subject to the trusts aforesaid, the trustees were to stand seised of the said hereditaments in trust for the said Duke for his life, and after his decease in trust for the Marquis in fee. After the death of the Duke the trustees converted the whole of the estate into personalty; and a creditor, whose judgment had been entered up against the Marquis of Blandford before the date of the trust deed, sought to attach the trust monies in the hands of the trustees, as bound by the judgment. Sir J. Leach said, "The creditor insists, that by force of his judgment he has a lien upon the monies produced by the sale of the trust estates; and if the interest of the Marquis were a vested interest in land, the creditor would be entitled; but the creditor had no *legal lien* upon the trust estates, but a *possible equitable lien* depending upon a contingency. The trustees had a full authority to sell, and to convert the realty into personalty. If any part had been unsold by the trustees, it would have remained land, and the judgment would have attached upon it; but it was all sold by the trustees, and the contingency which would have entitled the judgment creditor never took effect."

And the same principle seems to apply, where a judgment is entered up against a person after he has contracted to sell. But upon this subject we have the following opinion of Mr. Serj. Hill:—H. A. S., seised in fee of an estate, subject to his mother's jointure and to younger children's portions, contracted for the sale of the property in lots to different purchasers. After the date of the contracts H. A. S. executed a

conveyance to trustees, upon trust to convey to the different purchasers, and to invest part of the purchase money in the funds as an indemnity against the jointure and portions, and to pay the residue to himself. Subsequently to the deed of trust H. A. S. acknowledged a judgment. Mr. Serj. Hill was consulted on the part of the trustees, whether they would be safe in paying the money to H. A. S., as against the judgment of which they had notice, and also as against judgments, if any, of which they had no notice. The opinion was as follows: "As to the judgment of which the trustees had notice, though, to many purposes, the estate agreed to be sold is from the time of the contract the estate of the purchaser; yet I think the vendor is not before payment of the money to be considered a mere trustee, for the estate continues his at *law*, and even in *equity* he has a right to detain it until payment of the purchase money; and, therefore, the judgment creditor hath a right to so much of the purchase money as is sufficient to satisfy the judgment; and the trustees having notice of his right ought to pay it, if the money is in their hands. As to the judgments, if any, of which the trustees have no notice, I think a court of equity will not make them pay the money over again, if they apply it according to the deed of trust, because I think equity in the case of a judgment creditor, and a *bona fide* purchaser or a trustee without notice, will not interpose on either side, but will leave the law to take its course (c)."

And Sir J. Leach appears to have concurred in this opinion, that the vendor's interest after the contract is bound by a judgment; for in *Forth v. The Duke of Nor-*

(c) Cited *Forth v. Duke of Norfolk*, 4 Mad. 506, note (a).

folk (d), where a person had mortgaged an estate in fee, and then contracted to sell, and afterwards, before the conveyance, acknowledged a judgment, Sir J. Leach said, "An assignee for valuable consideration is discharged of the claim of the judgment creditor, *unless he has notice of it before the consideration paid*. If A., before the actual conveyance to him, had received notice of the judgment, then, being a purchaser of an equitable interest in a freehold estate from the debtor, and not having paid his purchase money, he would have been equally affected with the judgment as the debtor himself; and if he had afterwards paid the whole purchase money to the debtor, he would have still remained liable to the judgment creditor."

But in *Lodge v. Lyseley (e)* Sir L. Shadwell said, "he should not have given the opinion which the learned Sergeant had done, for it appeared to him that from the time H. A. S. entered into binding contracts to sell the lands, he not having judgments against him at that time, the purchasers had a right to file a bill against him, and have the legal estate conveyed." And this upon principle appears certainly the sounder doctrine, for if the vendor die after the contract, but before the conveyance, the purchase money will go to the executor; and if the contract work a notional conversion of the land into money in respect of the vendor's representatives, how shall not the same consequence follow in respect of the vendor's judgment creditors?

If a person convey an estate to trustees upon trust to sell for a limited purpose, and to pay the surplus to himself, his executors, and administrators, the land by the

(d) 4 Mad. 503.

(e) 4 Sim. 75.

effect of the deed is converted into money (*f*), and is therefore not liable to a judgment (*g*); but if the settlement be voluntary, it is then void as against a judgment creditor by the statute of Elizabeth (*h*).

The next point for consideration is, *how far* the *lien* of the judgment creditor against the trust estate extends. As equity follows the analogy of law, the inquiry may at first sight appear to be superfluous; but, on reference to the cases upon the subject, it will be found the authorities cannot be reconciled without the aid of some rather subtle distinctions.

A judgment creditor may come into a court of equity upon two grounds. First, upon a *legal elegit*, where he either seeks to remove an impediment to the legal execution of it, or, after the death of the conusor, sues for payment of his debt out of the conusor's personal assets, and, if they should be insufficient, then by sale (*i*) of his real estate: or, secondly, upon an *equitable elegit*, on the ground that he has no legal lien, and therefore can have no legal process. As the extent of relief ought in both cases to be the same, and the court has never attempted to take a difference, the authorities determined upon either head may be cited as applicable to the other.

Compton v. Compton (*k*), as stated in the Registrar's

(*f*) *Van v. Barnett*, 19 Ves. 102; *Biggs v. Andrews*, 5 Sim. 424. The decision in *Wright v. Rose*, 2 Sim. & Stu. 323, can scarcely be supported: see *Anon. case*, cited *Ripley v. Waterworth*, 7 Ves. 436, 437.

(*g*) *Lodge v. Lyseley*, 4 Sim. 70.

(*h*) 13 Eliz. c. 5.

(*i*) An *elegit* would at law give

the possession of the lands till the satisfaction of the debt, but equity assumes the jurisdiction of facilitating the remedy by a sale. See *Barnwall v. Barnwall*, 8 Ridg. 61; *O'Fallon v. Dillon*, 2 Sch. & Lef. 19; *O'Gorman v. Comyn*, Ib. 139; *Stileman v. Ashdown*, 2 Atk. 610.

(*k*) Cited in *Stileman v. Ashdown*, Amb. 15.

Book, was this:—Richard confessed a judgment, and died intestate. Henry, his son and heir, filed a bill against the administratrix of his father and the persons entitled to the benefit of the judgment, praying that the debt might be discharged out of his father's personal estate to the relief of the lands. Henry died, and the suit was revived by Hoby, his son and heir, and at the hearing it was decreed, somewhat unaccountably, that the *plaintiff* should pay the judgment. Upon this Pigott, the party interested in the judgment, filed a cross-bill against the plaintiff in the former suit to have the decree carried into execution, and the court on the hearing made the order as before. Against this decree the plaintiff Hoby appealed, and Lord Keeper Harcourt then directed that the personal estate of Richard should be applied in the first instance, and that Hoby should not be *personally* charged with the judgment debt, but should make good the same so far only as any rents and profits of the real estate of Richard had come to his hands; but in case such personal estate, rents, and profits should fall short of the judgment, then the deficiency should be made good "by sale of the *whole* real assets of Richard liable to the judgment (*l*).” The authority of this case cannot however have much weight, for, as was observed by Lord Hardwicke (*m*), the point whether the whole or a moiety should be sold, appears not to have been discussed.

In *Stileman v. Ashdown* (*n*) a father purchased an estate in the joint names of himself and his son, and afterwards confessed a judgment, and died in his son's lifetime.

(*l*) Reg. Lib. A. 1711, f. 134. 17.

(*m*) *Stileman v. Ashdown*, Amb. (n) 2 Atk. 477.

The judgment creditor filed a bill against the son, on whom the legal estate had devolved by survivorship, and Lord Hardwicke decreed the sale of *one moiety*. *Compton v. Compton* was not cited, and the plaintiff afterwards discovering that case petitioned for a re-hearing (o). Lord Hardwicke, in affirming his former decree, said, "The judgment affects the land, as it is bound by the judgment. Equity follows the law in this case, and as the plaintiff can extend only a moiety *there*, he shall have no more *here*. Suppose it was the case of a *bond creditor*; he might have an action of debt against the heir, and judgment against him upon assets descended, and this he is entitled to at common law, for it is the debt of the heir, and the action is in the *debet* and *detinet*; but if a *judgment* was obtained against the ancestor, a *scire facias* could not be brought against the heir at common law, because the heir was not bound. Before the statute of Westminster, there was no remedy against the ancestor in his lifetime upon a judgment on his land; and it is that statute which subjects one moiety thereof to the judgment. In what right then is the *scire facias* brought against the heir or purchaser? Why, only as *terre-tenant* (p), and by virtue of the statute. I thought of the objection myself, that a bond creditor would be in a better situation than a judgment creditor; and so he is, for as soon as the bond debt is turned into a judgment, it is extinct against the ancestor, and the creditor cannot, in the lifetime of the ancestor, bring any action upon the bond: can he then bring any action against the heir after it is

(o) 2 Atk. 608; Amb. 13. 12, b.; *Bowyer v. Rivitt*, Sir W.

(p) See *Harbert's case*, 3 Re. Jones, 87; Dyer, 271, a. pl. 25.

entirely extinct (q)? But still he obtains a great advantage by a judgment, as it gives him an opportunity of binding the land immediately, and likewise gives him a preference over all other bond creditors; and therefore the creditor prefers this real advantage to a precarious one of assets descending upon the heir after the death of the ancestor. If this is the case at law, what is there in equity to better his case? Why, nothing more than to accelerate the payment by directing a sale of the moiety, and not let the judgment creditor wait till he has been paid out of the rents and profits; but equity cannot change the rights of parties."

The decree has since been followed by numerous other decisions (r), and the point is so clear upon principle that further discussion appears needless.

(q) Sir A. Hart, alluding to this point, said, "The Courts have got rid of *Stileman v. Ashdown*, as savouring too much of technicality." *Leahy v. Dancer*, 1 Moll. 319. But *Crispe v. Blake*, 1 Ch. Ca. 23, had decided that the bond was extinguished by the judgment, and accordingly in *Barnwall v. Barnwall*, 3 Ridg. P. C. 24, and *O'Gorman v. Comyn*, 2 Sch. & Lef. 137, though the judgments were preceded by bonds, a sale of only a moiety was directed.

(r) *Rowe v. Bant*, Dick. 150 (as corrected from Reg. Lib., the case was as follows:—Rowe, the conusee of a judgment confessed by one Dingle, deceased, filed a bill against Bant, the executor of Dingle and who was also in possession of Din-

gle's real estate by the double title of grantee in Dingle's lifetime and general devisee in his will, praying payment of the judgment out of the real and personal estate of the testator, and that the grant to Bant in Dingle's lifetime might be declared void, as against the judgment, for want of consideration. The personal estate proved insufficient, and thereupon the Court ordered a sale of one moiety of the real estate comprised in the grant. B. 1750; f. 427.) ; *Darnsall v. Barwall*, 3 Ridg. P. C. 24; *O'Dowda v. O'Dowda*, 2 Moll. 483; *Anon. case*, Ib.; *O'Gorman v. Comyn*, 2 Sch. & Lef. 137; *Burroughs v. Elton*, 11 Ves. 33; *Williamson v. Park*, 2 Moll. 484; *Armstrong v. Walker*, Ib. In

We come now to the case of an *equity of redemption*, an interest which, in respect of judgments, has been governed by a very different rule.

If A., seised of an estate, mortgage it to B. in fee, and then confess a judgment to C., it is clear C. has a *lien* which entitles him to redeem B. But shall he redeem a whole or a moiety? So far as the judgment creditor has any claim of his own, a moiety only; but as B. cannot be compelled to part with the smallest fraction of the estate until he has been satisfied his whole debt, C. is under the necessity of redeeming the entirety. Again, when C. has taken a transfer of the security, it follows, that as mortgagee with a judgment against the mortgagor he has a right to tack, and no one can redeem any part of the estate out of his hands until payment, not only of the original mortgage debt, but also of the judgment. Thus it arises from a kind of necessity, and not from any wanton violation of principle, that in the instance of an equity of redemption the judgment creditor is paid by a sale of the *whole* estate.

Lord Hardwicke decreed to this effect in *Stonebwer v. Thompson* (s), saying the redemption "*must be entire*;" and in *Stileman v. Ashdown* (t) his Lordship, at the same time that he gave the judgment creditor a moiety only of the *trust estate*, ordered a sale of the *whole* of the lands

O'Fallon v. Dillon, 2 Sch. & Lef. 13, the sale of the estate was *not* confined to a moiety, but the creditor had entered up *two* judgments the *same term*, and then, as both judgments were of the same date,

the creditor might at *law* have taken both moieties in execution. See *Attorney-General v. Andrew*, Hard. 23.

(s) 2 Atk. 440.

(t) Ib. 477.

in *mortgage* (*u*). So, where there are several incumbrancers by judgment upon an equity of redemption, and the Court decrees a sale, the first judgment creditor is not confined to a moiety of the estate, but the common decree is, that the incumbrancers shall be paid their full demands out of the proceeds of the sale, according to their priority (*v*) (1).

There is one species of interest which, though bordering closely upon the nature of an equity of redemption, yet ought perhaps to be distinguished from it. In *Tunstall v. Trappes* (*w*), before cited, Trappes, in 1811, appointed an estate to the use that Davis might receive an annuity, and, subject thereto, to the use of Withy in fee upon trust, in case the annuity should be in arrear for six months, to sell the premises, and out of the proceeds to purchase an annuity of the same amount for Davis, and pay the surplus, after discharging the existing incumbrances, to Trappes; provided, that in case Trappes should be desirous of re-purchasing the annuity, and should pay the price to Davis, then the annuity should cease, and Withy, the trustee, should re-convey. In 1812 Trappes confessed a judgment, and the question was, whether it should affect the whole or only a moiety of the estate; and Sir L. Shadwell, on the ground that a

(*u*) Sir A. Hart, not observing the ground of the distinction, has accused Lord Hardwicke of inconsistency. *Leahy v. Dancer*, 1 Moll. 322. (*v*) *Sharpe v. Earl of Scarborough*, 4 Ves. 538; the cases cited *Ib.* 541. (*w*) 3 Sim. 286, see 300.

(1) It has been ruled, upon a similar principle, that, where freeholds and copyholds are blended in one mortgage, the equity of redemption of the whole is liable as assets to a bond creditor, though copyholds by themselves are not assets. *Acton v. Pierce*, 2 Vern. 480.

judgment creditor might redeem the entirety of lands in mortgage, held that the *lien* should extend to the whole. Now, there appears to be this distinction between an equity of redemption and the case just mentioned. In the former, the whole interest is in the mortgagee by non-fulfilment of the condition; and if the judgment creditor redeem the mortgagee, and then the mortgagor come to be relieved against the forfeiture, the Court will impose terms upon the mortgagor, and oblige him to discharge *every lien* upon the estate before he can be permitted to redeem the smallest part. But in *Trustellor v. Trappes* the whole interest was never in the annuitant either at law or in equity. The *legal estate* was limited to a third person in fee, and the *equitable* interest to the extent of securing the annuity only was in trust for the annuitant, but as to all the residue was in trust for the grantor. There was nothing to be redeemed, but merely a trust to be executed. The judgment creditor might take an assignment of the annuity, but he had no right to tack the judgment: the grantor could call for a reconveyance from the trustee on payment of the price agreed upon for the annuity: the Court could impose no terms, for no favour was asked.

It may be thought that by virtue of the late Act for the more effectual payment of debts (x) the judgment creditor may, *after the death of the cosutor*, be paid his demand out of the *whole of the real assets*. But the words of the Act are, that a person's lands shall be *assets* for payment of "as well debts due on *simple contract* as on *specialty*;" and from the language employed throughout the Act it appears, that no other creditors but those

(x) 3 & 4 W. 4, c. 104..

by simple contract or specialty were in the contemplation of the legislature. But a judgment is a debt *sui generis*, and answers to the description neither of a simple contract debt nor a specialty; so that a judgment creditor is apparently not helped by the statute. It is possible the framers of the act, knowing the judgment to be a *lien* upon the estate but forgetting the limited extent of that *lien*, omitted, accidentally, to provide for the case.

Is the judgment creditor, when he comes into equity for a sale of the estate, either in the lifetime of the conusor, or after his death, obliged, before the jurisdiction of the Court can attach, to sue out an actual *elegit*? If the judgment be a *legal lien*, and the creditor seek to remove some impediment to the *legal* execution of it, he must, it seems, first lay a foundation for the interference of equity by suing out an *elegit* at law (*y*); but if the judgment be an *equitable lien* (*z*), or if the judgment be *legal*, and the creditor after the death of the conusor file a bill for satisfaction of his claim out of the personal assets, and, in case of their deficiency, by a sale of the real estate (*a*), an actual *elegit* will not be an essential preliminary to the suit. The observations of Lord Fitzgibbon upon this point appear worthy of attention: "An objection," he said, "has been made at the bar, that the creditor's bill ought not to be entertained, because he did not *revive the judgments and sue out elegits*; and it has been asserted, that *until the judgment has been revived against the heir and tertenants of the conusee, and an elegit has been sued forth*, a Court of equity will not entertain a bill against the heir and executor to levy the

(*y*) See *Dillon v. Plasket*, 2 B. 286, see 298.

N. R. 239.

(*a*) *Barnwall v. Barnwall*, 3

(*z*) *Tunstall v. Trappes*, 3 Sim. Ridg. P. C. 24.

debt. The equity, upon which bills of this nature have been entertained, is founded on the Statute of Westminster, and has been adopted no less for the ease of the creditor in levying his debt with expedition, than in mercy to the representatives of the debtor, by relieving his estate from the ruinous expense of an extent at law, and of the suits which might arise in consequence of it. It is notorious to every man of the profession, that if a *scire facias* to revive a judgment against the heir and tenants of the conusor is put into the hands of a solicitor versed in the science of accumulating costs, he will be enabled to charge the estate with costs equal to the debt, if it be not considerable. If the tenants are charged unequally with payment of the debt, it lays a ground for fresh suits between them for contribution, and if the creditor levies the debt by extending the real estate of the debtor when there is a personal fund applicable to the payment of it, this lays a ground for a suit also by the heir against the executor to have the personal estate applied to reimburse him; and therefore it is that courts of equity have in this country, certainly for more than a century, entertained bills in the first instance *after the death of the conusor* for an account of his real and personal estate, and of the sum due for principal, interest, and costs on the foot of the judgment (b)."

Thus much concerning the judgment creditor's *equitable* remedy against a trust. We proceed now to the provision in the Statute of Frauds (c), which enables a judgment creditor in certain cases to sue a writ of execution against a trust estate at *law*.

The 10th section enacts, that "it shall be lawful for

(b) 1b. 61.

(c) 29 Car. 2, c. 3.

the sheriff, or other officer, to whom any writ or precept shall be directed at the suit of any person upon any judgment statute or recognizance, to deliver execution unto the party in that behalf suing of all such lands and hereditaments as any other person or persons be in any manner of wise *seised* or *possessed* in trust for the party against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution shall be so sued had been *seised* of such lands and hereditaments of such estate as they be *seised* of in trust for him *at the time of the said execution sued.*"

Upon the construction of this enactment the following points have been resolved.

1. As the statute speaks only of lands, &c. of which other persons are *seised* (*d*) in trust for the debtor, it does not extend to trusts of chattels real of which the legal proprietor is said not to be *seised*, but *possessed* (*e*).
2. An *equity of redemption* is not within the terms of the act (*f*).
3. A *bare* and *simple* trust only is intended, not one of a complicated nature, where the interests of other parties are mixed up with the debtor's title (*g*).
4. From the concluding words, "like as the sheriff might have done, if the *cestui que trust* had been *seised*

(*d*) In the first part of the clause are the words "seised or possessed," but afterwards, in two places, there occurs the word "seised" only.

(*e*) *Lyster v. Dolland*, 3 B. C. C. 478; *S. C.* 1 Ves. jun. 431; *Scott v. Scholey*, 8 East, 467; *Metcalfe v. Scholey*, 2 B. & P. 461.

(*f*) *Lyster v. Dolland*, *Scott v. Scholey*, *Metcalfe v. Scholey*, *ubi supra*; *Burdon v. Kennedy*, 3 Atk. 739.

(*g*) *Doe v. Greenhill*, 4 B. & Ald. 684; *Harris v. Booker*, 4 Bing. 96; *Forth v. Duke of Norfolk*, 4 Mad. 504, *per* Sir J. Leach.

of the estate whereof other persons be seised in trust for him *at the time of the execution sued,*" if, after the judgment has been entered up, but before actual execution, the estate be disposed of to a purchaser, so that when execution is sued there is no trust for the debtor *in esse*, in that case the words of the statute have failed to provide a remedy, and the judgment creditor cannot be put in possession (*h*).

The question has been much discussed whether in this case, though the judgment creditor cannot prosecute a *legal* execution, he may not subject the purchaser, if affected with notice, to an *equitable elegit* (*i*). It has been said, that as there is no execution at law, and equity follows the law, the creditor is without redress; but in this argument the principle that equity follows the law seems to be wrongly applied. A judgment binds a *legal* estate, and, as equity follows the law, a judgment is therefore in equity a *lien* upon the trust. The Statute of Frauds introduced an additional remedy by enabling the judgment creditor, in certain cases, to take *legal* execution of a trust. But affirmative statutes do not abridge the common law (*k*), and therefore the creation of a *legal* remedy in certain cases provided for by the act cannot preclude the judgment creditor from prosecuting his equitable *elegit* in other cases for which the statute has made no provision. The enactment was clearly meant to be remedial, but the doctrine contended for would impress on it a restrictive character, and convert it into a disabling statute. Sir E.

(*h*) *Hunt v. Coles*, Com. 226; *Mortg.* 620.

Harris v. Pugh, 4 Bingh. 335.

(*k*) *Attorney-General v. Andrew*, Hard. 27; 2 Inst. 472.

(*i*) See *Vend. & Purch.* c. 9, s. 5; *Coote on Mortg.* p. 71; 2 *Powel*

Sugden observes, "The difficulty in the way of the relief would be, that no instance of it can be found after the most diligent search." The reason probably is, that judgments have only in modern times been held to bind equitable interests at all: the doctrine was certainly not established before the Statute of Frauds. But the system of trusts has from that period downwards been gradually maturing, and the principles which governed uses, and were thence transferred into trusts, have since not indeed been abandoned, but received a much more enlarged and liberal application. Now that judgments are acknowledged to be *liens* upon equitable interests, the consequence must necessarily follow, that a purchaser must be bound by notice of a judgment, as he would be bound by notice of any other equitable incumbrance.

VII. Of extents from the Crown.

A trust, whether of a term or of a freehold, is liable to an extent from the Crown (*l*); and this not by the effect of any legislative enactment, but *per cursum scaccarii* at common law (*m*). The words of the writ issued to the sheriff are to hold inquest of the lands whereof the debtor, not *seisitus fuit*, but *habuit vel seisitus fuit*, and a person may be said to *have* lands, when by subpœna in Chancery he may exercise any dominion over them (*n*).

At common law the extent of the Crown did not au-

(*l*) *King v. Lambe*, M'Clel. 422, per Sir W. Alexander; *Chirton's case*, Dyer, 160. a; *S. C.* cited *Sir E. Coke's case*, Godb. 293; the cases cited Id. 294; Id. 298; *Babington's case*, cited Id. 299; *King v. Smith*, Vend. & Purch.

Append. No. 16, per Ch. Baron Macdonald.

(*m*) *Attorney-General v. Sands*, Hard. 495, per Lord Hale.

(*n*) See *Sir E. Coke's case*, Godb. 294.

thorize a sale of the lands, but only the perception of the rents and profits, until the amount of the debt was levied (*o*); this defect was supplied partially by a statute of Elizabeth (*p*), and a more effectual remedy has since been provided by the 25 G. 3, c. 35. It is by the latter statute enacted, that "it shall be lawful for his Majesty's Court of Exchequer, and the same court is thereby authorized, on the application of his Majesty's *Attorney-General* (*q*) in a summary way by *motion* (*r*) to the same court, to order that the *right, title, estate, and interest of any debtor* to his Majesty, his heirs and successors, and the right, title, estate, and interest of the heirs and assigns of such debtor which have been or shall be extended under and by virtue of any extent or *diem clausit extremum*, shall be sold as the court shall direct, and the conveyance shall be made by his Majesty's Remembrancer in the said Court of Exchequer or his deputy, under the direction of the said court, by a deed of bargain and sale to be inrolled in the said court."

By the effect of this enactment, a trust or equity of redemption (*s*) of a Crown debtor may now be sold upon summary application to the Court of Exchequer by motion.

VIII. Of forfeiture.

A trust of lands is not forfeitable at common law for attainder either of treason or felony (*t*); for forfeiture

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| (<i>o</i>) <i>Rex v. Blunt</i> , 2 Y. & J. J. 120. | |
| 122, <i>per</i> Baron Hullock. | (<i>s</i>) <i>King v. De la Motte</i> , Forr. 162. |
| (<i>p</i>) 13 Eliz. c. 4. | |
| (<i>q</i>) See <i>Rex v. Bulkeley</i> , 1 Y. & J. 256. | (<i>t</i>) <i>Attorney-General v. Sands</i> , Hard. 495, <i>per</i> Lord Hale; 1 Hale's P. C. 247; Jenk. 190. |
| (<i>r</i>) See <i>Rex v. Blunt</i> , 2 Y. & | |

works only upon *tenure*, and a trust is *holden* of nobody. The ground of the forfeiture is, that all estates are upon condition of duty and fidelity to the lord, and upon breach of allegiance they return to the king, from whom they originally proceeded (*u*).

The exemption of the *use* from forfeiture was remedied in the case of treason, by the 26 H. 8, c. 13, s. 5, whereby it was enacted, that "every offender convicted of high treason by *presentment, confession, or process of outlawry*, according to the due course and custom of the common laws of the realm, should forfeit to the King all such lands, &c. which such offender should have of any estate of inheritance in *use* or *possession*."

The following year was passed the 27 H. 8, by which uses were abolished, and, as the trust which grew up in the place of the use was held to be an interest *sui generis*, and not within reach of the statutes directed against uses, the legislature was again called upon to interpose some special enactment to remedy the defect.

The 33 H. 8, c. 20, s. 2, declared, that "if any person or persons should be attainted of high treason by the course of the *common laws or statutes of the realm*, every such attainder by the *common law* should be of as good strength, value, force, and effect, as if it had been done by authority of parliament; and that the King's Majesty, his heirs and successors, should have as much benefit and advantage by such attainder, as well of *uses, rights, entries, conditions*, as possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of parliament, and should be deemed and adjudged in *actual and real possession* of the lands, tene-

(*u*) Gilb. on Uses, 38.

ments, hereditaments, uses, goods, chattels, and all other things of the offenders so attainted, which his highness ought lawfully to have, and which they, so being attainted, ought or might lawfully lose and forfeit, if the attainder had been done by authority of parliament, *without any office or inquisition to be found of the same.*"

Notwithstanding this statute, it was held in *King v. Dacombe* (x), and is said to have been also resolved in *Abington's case*, that the *trust* of a freehold was *not* forfeited upon attainder of treason; and Sir E. Sugden remarks, that this doctrine "may be thought to be founded on reason, because it is not pretended that the statute of 26 H. 8 can embrace trusts which have succeeded to uses, and it does not appear to have been the intention of the 33 H. 8 to create a forfeiture of any equitable estates which had sprung up since the former act. The statute had other objects(y)."

To understand the scope of the enactment it must be observed, 1. That previously to the 33 H. 8 it was only in the case of a person attainted by act of parliament, and then by a special proviso, that the king was put in *immediate possession* of the offender's lands, for in attainders by ordinary course of law, whether by common law or under a statute, the king was not in possession *until office found*. 2. That the 26 H. 8 had extended the forfeiture to lands in *use* or *possession*, but *not* to *rights*, *entries*, or *conditions*; and now that the 27 H. 8 had passed, the 26 H. 8 was not even applicable to *uses*, or, as they were henceforth to be called, *trusts*. 3. That the 26 H. 8 had embraced attainders by *presentment*,

(x) Cr. Jam. 512.

and see *Burgess v. Wheate*, 1 Ed.

(y) Gilb. on Uses, 78, note (9); 221.

confession, verdict, or process of outlawry, but had omitted other cases, as where the offender stood mute. The intention of the legislature then, in passing the 33 H. 8, was, as resolved in *Dowtie's case* (z), 1. To vest the actual possession in the King by the attainder *without office*; 2. To extend the forfeiture to *rights, entries, conditions, &c.* which had hitherto not been affected by attainder; and, 3. To apply the statutory provisions to all cases of attainder, including those which the 26 H. 8 had accidentally omitted.

Assuming the act to have had a remedial scope, can it be supposed, that, when "rights, entries, and conditions" were, for the first time, made forfeitable by virtue of this enactment, the word "uses," which occupies the first place in the series, should have been inserted as mere surplusage, remembering that uses, by having been turned into possessions by the 27 H. 8, had escaped the forfeiture imposed upon them by the 26 H. 8? The insertion of the word "uses," can be no argument that "trusts" were not intended, for at that day "uses" and "trusts" were not as now contradistinguished, but were employed indifferently, as terms perfectly synonymous.

In support of this reasoning may be cited the opinions expressed by Baron Turner, and Lord Hale, in the well-considered case of *Attorney-General v. Sands* (a), that the trust of an inheritance, though not forfeitable at common law, had been made so by the 33 H. 8. And Lord Hale afterwards recurs to the subject in his *Pleas of the Crown* (b), and argues the point there with great strength of reasoning:—"By the statute of 27 H. 8," he says, "all uses

(z) 3 Re. 9, b.

131; *S. C.* Freem. 130.(a) Hard. 495; *S. C.* Nels.

b) 1 P. C. 248.

were drowned in the land; but there have succeeded certain equitable interests called *trusts*, which differ not in substance from uses; nay, by that very statute they come under the same name, viz. uses or trusts. By the statute 33 H. 8, there is a special clause that the person attainted shall forfeit all 'uses;' and what other uses there could be at the making of the statute 33 H. 8, but only trusts such as are now in practice and retained in Chancery, I know not. It was agreed in the *Earl of Somerset's case*, and so resolved in *Abington's case*, that a trust of a freehold was not forfeited by attainder of treason. But how this resolution in *Abington's case* can stand with the statute of 33 H. 8, I see not; for certainly the uses there mentioned could be no other than trusts; and therefore the *equity* or *trust itself*, in cases of attainder of treason, seems forfeited by the statute, though possibly the *land itself* be *not* in the king (c)."

Equities of redemption appear to be forfeitable for attainder of treason under the 33 H. 8 (d); for the statute has re-enumerated *conditions*, and the interest of the mortgagor is a condition which, though broken at law, is saved whole to him in a court of equity.

A trust in favour of an *alien* is forfeitable to the Crown without statute, on the principle of public *policy*; for at *law* an alien has no capacity to purchase lands, lest the realm should be impoverished, if the revenues might be transported into foreign countries, and put in sub-

(c) In *Attorney-General v. Sands* it was laid down, according to Nelson's report (p. 131), that the estate was executed in the King by force of the statute; but, according to

Freeman (p. 130), that the estate was to be executed in the King by a court of equity. *Id. qu.*

(d) *Anon. case*, cited *Reeve v. Attorney-General*, 2 Atk. 223.

jection under a foreign prince (*e*); and if an alien were allowed to receive the rents and profits of lands *in equity*, the mischief would be the same. However, the *legal* estate is not forfeited, but the King must prosecute his right by *subpœna* (*f*). This he may do either in the Court of Chancery or Exchequer (*g*); and of course without any office found or inquisition taken (*h*).

Trusts of *chattels*, whether real or personal, were always deemed subject to forfeiture (*i*); and if a term be in trust for the *wife* of the felon, but not for her separate use, it seems the trust shall be affected by the forfeiture of the husband (*k*). But in these cases the forfeiture reaches not to the chattel itself, but merely entitles the King to sue a *subpœna* in equity (*l*).

IX. Of Escheat.

A trust in fee of lands is not subject to escheat (*m*). This was determined in the great case of *Burgess v. Wheate* (*n*), before Lord Northington, assisted by Lord

(*e*) See *Holland's case*, Styl. 21; *Collingwood v. Pace*, O. Bridg. 431.

(*f*) *Attorney-General v. Sands*, Hard. 495, *per* Lord Hale.

(*g*) *Burgess v. Wheate*, 1 Ed. 189, *per* Sir T. Clarke.

(*h*) *S. C.* lb. 187, *per eundem*.

(*i*) *Wikes's case*, Lane, 54, agreed; *King v. Dacombe*, Cr. Jam. 512; Jenk. 190, case 92; *Attorney-General v. Sands*, Hard. 405; *Pawlett v. Attorney-General*, Hard. 467, *per* Lord Hale; *Sir J. Dack's case*, cited *Holland's case*, Al. 16.

(*k*) *Wikes's case*, Lane, 54, *per*

Barons Snig and Altham.

(*l*) *Holland's case*, Al. 14; *Sir J. Dack's case*, as cited by Rolle, J. Id. 16; *Attorney-General v. Sands*, Hard. 495, *per* Lord Hale.

(*m*) *Attorney-General v. Sands*, Hard. 488; and see 1 Harg. Jurid. Exerc. 383.

(*n*) 1 Ed. 176; *S. C.* 1 W. Black. 123. There has been no decision upon the point since; but see several cases bearing upon the subject collected by Lord Henley at the end of *Burgess v. Wheate*, 1 Ed. 259; and see *Henchman v. Attorney-General*, 2 S. & S. 498.

Mansfield and Sir T. Clarke. The arguments of these eminent judges, too long for insertion in this place, are replete with learning, and will amply repay a very careful perusal: it must be mentioned, however, that Sir T. Clarke and Lord Mansfield, while they pursued different lines of reasoning, carried their principles to too great an excess. Sir Thomas Clarke contended that trusts must be governed strictly by uses, and therefore, as no escheat in equity was of a use, there could be none of a trust. But this position is too large; for trusts do not follow absolutely the law of uses; for then no curtesy would be of a trust, the judgment creditor would have no lien, and equitable interests would not be assets. Lord Mansfield, on the other hand, advanced the doctrine, that as lands escheat at law, so trusts must escheat in equity; that trusts, since the statute of H. 8, are not regulated by uses, but the maxim is, 'Equity follows law,'—'The trust is the estate.' But to this it must be answered, that a trust has always been recognised as a thing *sui generis*, not as identical with the legal fee: it binds not, for instance, a purchaser for valuable consideration without notice. The intermediate opinions of Lord Northampton must be regarded as those most in accordance with the general system: trusts, he thought, were to be administered on the footing of uses; but not, as Sir Thomas Clarke maintained, to the exclusion of the improvements adopted subsequently to the statute of H. 8: he agreed with Lord Mansfield, that trusts imitated the legal possession; but he added the qualification, *as between the privies to the trust only*, and not as respected strangers. "Equity," he said, "follows the law; and, *as between the cestui que trust and those claiming by, from, and under him*, it is equity that he should be considered

as formally possessed of that estate of which he is and appears substantial owner. It is true this Court has considered trusts, *as between the trustee, CESTUI QUE TRUST, and those claiming under them*, as imitating the possession; but it would be a bold stride, and, in my opinion, a dangerous conclusion, to say, therefore, this Court has considered the creation of a trust as a mere nullity, and the estate in all respects the same, as if it still continued in the seisin of the creator of the trust or the person entitled to it. My objection to the claim of the lord is, that it is for the execution of a trust that does not exist. Where there *is* a trust, it should be considered in this Court as the real estate *between the cestui que trust, and the trustee, and all claiming by or under them*; and the trustee should take no beneficial interest that the *cestui que trust* can enjoy; but, for my own part, I know no instance where this Court ever permitted the creation of a trust to *affect the right of a third (o).*"

X. The descent of the trust.

A trust is governed by the same rules of descent, as the legal estate is on which the trust is ingrafted, and that whether the legal estate descends according to the course of common law, or is subject to a *lex loci*. If one seised of lands *ex parte maternâ* convey to a person upon trust, and no trust is expressed, the resulting interest is part of the original estate, and will descend in the maternal line; and, failing the heirs on the part of the mother, will rather absolutely determine, than pass into the paternal line (*p*). If the land be subject to

(o) 1 Ed. 250.

177, see 186, 216, 256; *Langley*

(p) *Burgess v. Wheate*, 1 Ed. v. *Sneyd*, 1 Sim. & Stu. 45.

gavelkind, borough English, or other custom, the equitable interest will follow the same course of inheritance (*q*). And the analogy to law is so strictly preserved, that if the last *cestui que trust* had no seisin of the equitable estate corresponding to *possessio fratris* at law, the trust will descend to the brother of the half blood, not to the sister of the whole blood (*r*). But, by the late Act, the half blood is now capable of inheriting estates, whether legal or equitable (*s*).

XI. Of assets.

The trust of a *chattel* was always accounted assets in equity (*t*); but whether the trust of a *freehold* should be assets in the hands of the heir for payment of debts by specialty was for a long time *vexata quæstio*. On the one hand it was argued, the trust ought to follow the use, and the use was *not* liable to a bond creditor; on the other hand it was said, the trust since the Statute of Uses had been conducted by the courts on more liberal principles, and, as the legal fee was available to the discharge of specialty debts at law, a court of equity ought to adopt the same rule in the administration of trusts.

It was determined by Lord Hale, Chief Justice Hyde, and Justice Windham, in the case of *Bennet v. Box*, that a trust in fee should *not* be assets (*u*); and Lord Keeper Bridgman afterwards felt himself bound by the

(*q*) *Fawcett v. Lowther*, 2 Ves. 304, *per* Lord Hardwicke; *Banks v. Sutton*, 2 P. W. 713, *per* Sir J. Jekyll; *Jones v. Reasbie*, 22 Vin. Ab. 185, pl. 7.

(*r*) *Banks v. Sutton*, 2 P. W. 713, *per* Sir J. Jekyll; *Cowper v. Earl Cowper*, Ib. 736, *per eundem*; Co. Lit. 14, b.; and see the cases

cited *Casborne v. Scarfe*, 1 Atk. 604.

(*s*) 3 & 4 W. 4, c. 106, s. 9.

(*t*) *Attorney-General v. Sands*, Freem. 131; *Barthrop v. West*, 2 Ch. Re. 62; *Duke of Norfolk's case*, 3 Ch. Ca. 10.

(*u*) 1 Ch. Ca. 12.

authority of this decision in respect of a *trust* (*x*), though he doubted somewhat as to an *equity of redemption* (*y*); and so the law was laid down by Lord Hale in *Attorney-General v. Sands* (*z*). The question was renewed before Lord Nottingham in the case of *Grey v. Colville* (*a*):—John Colville gave a bond to Lady Grey for 1500*l.*, and died intestate. The obligor in his lifetime had purchased lands in the names of himself and Wise, to hold to them for their lives, remainder to Sir John and his heirs, and other lands in the names of Morris and Saunders in trust for Sir John in fee. Lady Grey brought an action at law against the heir, who (the case occurring prior to the Statute of Frauds) pleaded *riens per descent in præ-senti*, but only the reversion of the lands expectant on the decease of Wise. Lady Grey then filed a bill in Chancery to have the trust estates declared assets in equity, and Lord Nottingham, acting on the broad rule of analogy to law, decreed the debt to be paid.

The case was afterwards reheard before Lord Guildford, and is reported by Vernon under the title of *Creed v. Covile* (*b*). The plaintiff argued that *Bennet v. Box* was a precedent of the Judges' making, who were for re-

(*x*) *Pratt v. Colt*, 1 Ch. Ca. 128; *S. C. Freem.* 139.

(*y*) *Trevor v. Perryor*, 1 Ch. Ca. 148.

(*z*) *Hard.* 490; *S. C. Freem.* 131; *S. C. Nels.* 134.

(*a*) 2 Ch. Re. 143. This case has been the most unfortunately reported of any perhaps in the books. In page 143, for "the defendant's wife," read "the defendant Wise;" and a few lines after, for "wife," read "Wise."

In page 144, for "Colville and his wife," read "Colville and Wise;" for "of one lease," read "of one Leke," and correct the passage thus, "The said Josia also insists, that the premises are incumbered by a former judgment of one Leke for 800*l.*, and that the plaintiff's creditors, and other the creditors, &c., insist they are creditors," &c. In page 145, for "the defendant's wife," read "the defendant Wise."

(*b*) 1 Vern. 172.

straining the Court of Chancery to the strict rules of law; that the trust of a term was assets, and why not the trust of a fee simple? an equity of redemption was assets, and why not a trust? But Lord Guildford said, "I know the case of *Box v. Bennet* has had hard words given it, and been much railed at, but the decree in that cause was made upon great advice, and I do not know how I could be better advised now." And he said, "There was a difference between the case of an heir and the case of an executor, and therefore the trust of a term and the trust of an inheritance were not the same in this point; for whatever money came to the hands of an executor, either by sale of the term, or if money was decreed to him in a court of equity, would be assets; but if an heir before action brought sold and aliened the assets, the money was not liable in his hands (c), unless the sale were with fraud and collusion; as, if an heir sold and bought again, there the new-purchased lands would be assets. And as to an equity of redemption, if a man had a mortgage and a bond, before the mortgage should be redeemed by the heir the bond ought to be satisfied, but he did not know that an equity of redemption *should* be assets in equity to *all creditors*." And his Lordship said, he "should be much governed by the case of *Bennet v. Box*, unless they could shew that the latter precedents had been otherwise," and directed them to attend him with precedents towards the latter end of the term. The cause was brought on again the December following, and the Court ordered that the parties should attend the two Chief Justices and the Lord Chief Baron, who were desired to certify their opinion on the

(c) Since made liable by 3 W. & M. c. 14.

question (*d*). In Michaelmas term the next year, upon the motion of the defendants, it was ordered, that, unless plaintiffs, the creditors, procured the certificate of the Lord Chief Justices' and Lord Chief Baron's opinion by the first day of the next term, *the bill should be dismissed without further motion* (*e*). No further proceedings appear in the cause; and, therefore, it must be concluded Lord Nottingham's decision was reversed (*f*).

Thus stood the law before the Statute of Frauds (*g*). By the 10th section of that Act it was declared, that "if any *cestui que trust* should die, leaving a trust in fee-simple to descend to his heir, then and in every such case such trust should be deemed and taken, and was thereby declared to be, assets by descent, and the heir should be liable to and chargeable with the obligation of his ancestor for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended."

This enactment must be taken to embrace *simple* trusts only, and not *complicated* trusts (*h*), or equities of redemption (*i*). We have still therefore to ask, whether such interests as are without the statute may not, upon the *general principles* of equity, be treated as assets by analogy to law.

(*d*) R. L. 1683, A, fol. 166.

(*e*) R. L. 1684, A, fol. 210.

(*f*) But see *Goffe v. Whalley*, 1 Vern. 282.

(*g*) 29 Car. 2, c. 3.

(*h*) The former part of the clause, which enables the sheriff to take a trust in execution, has been con-

strued not to include a *complicated* trust, and therefore it is presumed the latter part of the clause cannot be differently interpreted.

(*i*) *Plunket v. Penson*, 2 Atk.

293, per Lord Hardwicke; *Sawley v. Gower*, 2 Vern. 61, per Lord Jeffries.

In *Plucknet v. Kirk* (*k*) it was expressly decided by Lord Jeffries, that an *equity of redemption* of a mortgage in fee should be assets in equity to the payment of bond debts, and so it was held in an anonymous case reported by Freeman (*l*); and the same law was recognized in *Acton v. Peirce* by Lord Keeper Wright (*m*), and was admitted by Lord Hardwicke without observation in *Plunket v. Penson* (*n*).

The doctrine established by these authorities with respect to *equities of redemption* is directly at variance with the decision in *Grey v. Colville*, relating to *trusts*. But the maxim is generally admitted, that, as between the trustee and *cestui que trust* and all claiming by or under them, the equitable ought to imitate the legal estate, and therefore, upon principle, the rule that governs equities of redemption ought equally to be applied to every other equitable interest. It would be a strong position to advance, that a trust is not assets unless

(*k*) 1 Vern. 411; and see Lord Jeffries's opinion in *Sawley v. Gower*, 2 Vern. 61. *Plucknet v. Kirk*, as stated in Reg. Lib., was this:—Kirk, seised of an estate in fee, mortgaged it to Sutton in fee for securing 1,300*l.* and interest, and afterwards confessed a judgment to Plucknet for securing a loan, and two judgments to Rogers for securing other loans, and became indebted to Wood and Dakins by bond. The two judgment creditors joined with the two bond creditors and others who were simple-contract creditors in filing a bill, by which they prayed that, in default of personal assets, they

might redeem the mortgage, and Lord Jeffries decreed that the plaintiffs, the judgment and bond creditors, might redeem, and as to the plaintiffs, the simple-contract creditors, his Lordship said, “he would advise with the Lords and the Judges thereon, and after he had so advised would give such directions touching the said debts, whether they should be let into the redemption of the premises, as should be agreeable to equity.” 1686, B, fol. 181, 844.

(*l*) P. 115.

(*m*) 2 Vern. 480.

(*n*) 2 Atk. 290.

the debtor had merely a plain and simple trust; but such would be the result, were trusts only liable as assets by virtue of the Statute of Frauds.

The question, as regards debtors dying since the 29th of August, 1833, has now been rendered nugatory by the 3 & 4 W. 4, c. 104, which enacts, that all a person's "*estate or interest* (which must include a trust) in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold," shall be assets for the payment of debts as well on simple contract as on specialty.

There remains to be considered the question, whether a trust shall be administered as *legal*, or *equitable* assets; and upon this subject we shall first advert to the case of trusts of chattel interests, that is, to equitable assets in the hands of the executor.

It may be remarked *in limine*, that if an executor recover money in that character upon a trust or other equitable right, the proceeds, *when actually come to his hands*, will be legal assets, even in a court of law (o): is it not, then, an inconsistency to say, that, if the property has been reduced into possession, a court of equity shall administer it as legal assets, but if it be still outstanding, it shall be administered as equitable assets? Upon what principle can the Court vary the rights of parties from an accidental circumstance arising out of the conduct of the executor?

In *Morgan v. Sherrard* (p) a person had mortgaged a term of years, and afterwards acknowledged a statute to

(o) *Hawkins v. Lawse*, 1 Leon. *Wrayman*, cited *Ib.*; *S. C.* reported 155, *per Periam, J.*; *Anon. case*, Mo. 858.

1 Roll. Rep. 56; *Harwood v.* (p) 1 Vern. 293.

Lord Sherrard, and then confessed a judgment to Morgan. The latter filed his bill against the executor to have the equity of redemption made legal assets (a judgment at law taking precedence of a statute), and so Lord Guildford decreed it.

Wilson v. Fielding (q) not only confirms this decision, but sets the principle in a clear light. An executor had exhausted the personal assets by part payment of a debt secured by a mortgage and the testator's bond, and the simple-contract creditors filed a bill against the heir to oblige him to refund what had been discharged of the mortgage debt out of the personal estate. The heir was decreed to make good the money, and the dispute was, whether the fund, which was *called* equitable assets because it could only be recovered in a court of equity, should be distributed among the creditors *pari passu*, or, one of the creditors having obtained a judgment against the executor, should be administered according to the legal priority. Lord Macclesfield said, "The doctrine that seems to be laid down by the counsel for the simple-contract creditors, that there is this standing difference between assets in law and assets in equity, that, though the former shall go according to the course of administration prescribed by law, yet the latter shall, without any regard to this, go among the creditors equally however different the nature of their debts, is *a doctrine without any reason or foundation, and would establish a rule in equity directly contrary to the known rules of law as to the order in which debts are to be paid*. Indeed, as to the case put of land devised by a testator to be sold for the payment of his debts, it is so, and this Court does always decree the profits arising from the sale

(q) 10 Mod. 426; S. C. 2 Vern. 763.

equally among all the creditors; but then this land may be considered as *a gift of the testator among all his creditors, and as the testator, the donor, has not thought fit to make any distinction between his creditors, so this Court, which is in nature of a trustee for the testator, will make none either. But, generally speaking, there is no difference between assets in law and assets in equity, but both must be distributed by the executor in a course of administration.*"

The next case is that of the creditors of Sir Charles Cox (*r*), in which the property in question was the equity of redemption of a term. Sir J. Jekyll was of opinion it should be *equitable* assets, "it being," he said, "precarious and doubtful whether the mortgage would prove worth redeeming, and all debts being in a conscientious regard equal, and equality the highest equity;" but at the same time it was resolved by the Court, that where a bond was due to A., but taken in the name of B., and A. died, *that* should be paid *in a course of administration*, for in such a case there could hardly be any dispute touching the *quantum* of the debt, seeing the principal, interest, and also the costs, must be paid to the obligee in the bond; whereas, in the other case, the costs must be paid by the party coming to redeem: for the same reason, if a term of years were taken in the name of B. in trust for A., this on the death of A. would be legal assets, for here the right to the thing was plain; and if the trustee contested it, he must *primâ facie* do it on the peril of paying costs.

Hartwell v. Chitters (*s*), before Lord Hardwicke, was

(*r*) 3 P. W. 341.

Willis, 1 Barn. & Cres. 372.

(*s*) Amb. 308; and see *Clay v.*

also the case of the equity of redemption of a term, and (the point apparently not undergoing much discussion) was determined in conformity with Sir J. Jekyll's decision.

Mr. Cox, in his note to Peere Williams, disapproves of the doctrine held by Sir Joseph Jekyll, that an equity of redemption should be accounted *equitable assets*; and observes, that, upon looking into the Master's report made in pursuance of the decree in *Cox's case*, it appeared the only two creditors were in equal degree, and the Master therefore declined to distinguish which were legal and which were equitable assets, so that the point in question was not in fact determined; and he adds, that *Hartwell v. Chitters* rested entirely on the authority of *Sir Charles Cox's case*. At all events it must be remarked, that Sir Joseph Jekyll expressly approved the doctrine, that a *plain trust* should be *legal assets*, though he followed his bent of taking subtle and refined distinctions, by holding that a *doubtful* and *precarious* equity should be administered as *equitable assets*. A precarious trust would now, it is submitted, be governed by the same rules as a plain trust; and therefore his Honor's distinction must be considered as overruled (*t*).

A trust in *fee* stands in a very different light from the trust of a chattel in the hands of the executor. As regards the inheritance, it is only in respect of creditors by specialty in which the heirs are bound, that the question of legal or equitable assets can in fact arise, for specialties in which the heirs are not bound, and simple-contract debts, are not payable out of real estate (*u*), and

(*t*) See *Sharpe v. Earl of Scarborough*, 4 Ves. 541. late statute 3 & 4 Will. 4, c. 104, which will be noticed presently.

(*u*) That is, independently of the

statutes and judgments are *liens* upon the equitable fee, and are payable not as debts, but as incumbrances. In respect then of specialties in which the heirs are bound, a plain and simple trust is made assets in a court of law by the Statute of Frauds, and therefore is legal assets in equity (*x*); but complicated trusts, and equities of redemption, are not touched by the statute; and it would seem, upon principle, that as equity subjects the trust to specialty creditors by analogy only to law, the Court ought, by observing the analogy throughout, to adopt the legal course of administration.

Lord Nottingham, than whom no Chancellor had a more just conception of the true nature of trusts, determined to this effect in the case of *Grey v. Colvile* (*y*). The bond-creditors had, since the ancestor's decease, entered up judgments against the heir; and Lord Nottingham, following the analogy of law, decided that the creditors should be paid *according to the priority of their judgments*.

In *Plunket v. Penson* (*z*) a testator, seised of the *equity of redemption of a trust estate in fee*, devised it to his son, who was also his heir, subject to the testator's debts and some annuities and legacies, and died indebted by bond and simple contract. The point at issue was, whether both species of creditors should be paid *pari passu*, or the legal priority should be observed. The case of *Massam v. Harding* was cited by counsel; and it was said that Lord Chief Baron Comyns had there taken the distinction, that, if it was a mortgage for years, then the equity of redemption would

(*x*) *Plunket v. Penson*, 2 Atk. 293, *per* Lord Hardwicke; *King v. Bollett*, 2 Vern. 248.

(*y*) 2 Ch. Re. 143.—The case

was overruled by Lord Guildford, 1 Vern. 172, but no fault was found with the order of payment.

(*z*) 2 Atk. 290.

be *legal* assets, because the whole interest was not gone from the mortgagor, the reversion in fee being left in him; otherwise where it was a mortgage in fee (*a*); and Lord Hardwicke said, he thought the distinction was right; and in the principal case his Lordship said, "I agree that if a mere trust estate descends upon an heir at law it will be considered as legal, and not as equitable assets; and this is founded upon the third clause of the statute (*b*), which gives a specialty creditor his remedy at law by an action of debt against the heir of the obligor; but it has not made a mortgage in fee of a trust estate subject to the same thing; for if the specialty creditor should bring an action against the heir of the mortgagor, he might plead *riens per descent*. Therefore, if the plaintiff be under the necessity of coming here, this Court will act according to its known rule of doing equal justice to all creditors without any distinction as to priority." But whatever force may be attributed to these observations, it certainly was not *decided* by this case, that an equity of redemption in fee should be administered as equitable assets. Had the ancestor been seised of the *legal* fee, Lord Hardwicke held, that, as the *legal* descent would not have been broken by the equitable charge, the bond creditor might *at law* have recovered his debt against the heir; and thus, having a claim *dehors* the will, would have been preferred to the simple-contract creditors, who had only a title *under* the will. But the ancestor was seised, not of the *legal* fee, but of an *equity of redemption*; and against the heir of such an interest the bond credi-

(*a*) This does not appear in the short note of the case in Bunb. 339.

3 W. & M. c. 14. But *quære*, if the 10th section of the Statute of Frauds, 29 Car. 2, c. 3, was not meant.

(*b*) Viz. of Fraudulent Devises,

tor had no action at law, but only a remedy in Chancery. Now the *equitable* right was to be made strictly analogous to the *legal* right; and as at law the bond creditor could only have sued the *heir*, and not the *devisee* for payment of debts, the question for consideration was, whether the equitable interest had descended or been devised. The testator by charging the land with his debts had certainly not broken the descent as to the surplus interest that might come to the heir; but, as the debts exceeded the value of the estate, he had disposed of the *whole* beneficial interest, and the bond creditor could have no remedy against the heir, for there was *riens per descent*: he could only come into equity with the other creditors under the *equitable charge*; and as an estate devised for payment of debts must be administered as equitable assets, the bond creditor had no claim to priority. The decision viewed in this light is perfectly consistent with principle, and is not at variance with Lord Nottingham's decree in *Grey v. Colvile*.

In *Sharpe v. The Earl of Scarborough*(c) a testator died seised of an equity of redemption in fee, and the dispute was between the creditors who had obtained judgments in the lifetime of the testator, and the simple-contract creditors, who claimed under a charge in the will. Lord Loughborough held, that, as the judgment creditors might have redeemed according to their priorities, they had *liens* upon the estate, and were therefore entitled to preference. This was the single point determined, though the case has often been cited in support of the doctrine just advocated, that an equity of redemption in fee shall be administered as legal assets.

(c) 4 Ves. 538.

Before concluding the subject under discussion, we must advert to the late statute for the more effectual payment of debts (*a*).

The Act is intituled “An Act to render Freehold and Copyhold Estates Assets for the Payment of simple contract Debts;” and it is thereby declared that “when any person shall die seised of or entitled to *any estate or interest* in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with, or devised subject to the payment of his debts, the same shall be assets *to be administered in courts of equity* for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons, who died seised of freehold estates, was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound: provided always, that in the administration of assets *under and by virtue of this Act* all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract, or by specialty in which the heirs are not bound, shall be paid any part of their demands.”

(*d*) 3 & 4 Will. 4, c. 104.

Upon the construction of this statute we may suggest the following questions :—

1. Do the words “ assets to be administered in equity ” mean only that the creditor shall have his remedy in chancery, and not at law ; or do they further intend that the estate shall be taken as *equitable* assets ? *Semble* the latter.

2. When it is declared that “ *any* estate or interest in lands shall be assets to be administered in equity,” does the Act convert chattels real and trusts of chattels real, which before were legal assets, into equitable assets ? *Semble* not.

3. Does the Act alter the mode of administration of *freehold interests that were assets before* ; as, if a person die seised of an equity of redemption, shall a bond creditor who has entered up judgment against the heir be paid, as in *Grey v. Colvile*, before a bond creditor who has not entered up judgment ? The concluding direction, that specialties in which the heirs are bound shall be paid before simple contract debts, and specialties in which the heirs are not bound, was probably meant to apply to *copyholds*, which before were not assets to any creditors ; and the restriction of the proviso to “ the administration of assets *under that act* ” seems to imply, that, as to interests which were assets independently of the Act, the course of administration should not be changed.

CHAPTER XXVI.

RELIEF OF THE CESTUI QUE TRUST AGAINST THE FAILURE
OF THE TRUSTEE.

WE have now pointed out in what the estate of the *cestui que trust* primarily consists: we have also examined what are the incidents and properties of it by analogy to estates at law: it follows next that we speak of certain *collateral or subsidiary rights* by which the *cestui que trust* is supported in the enjoyment of his equitable interest against the various accidents to which an estate, not direct, but transmitted through the instrumentality of another, must necessarily be exposed. In the present chapter we shall consider the force of the maxim, "A trust shall not fail for want of a trustee."

The rule is, that, wherever the intention of the settlor can be clearly collected, and there is no want of consideration, the Court will follow the estate into the hands of the legal proprietor, and compel him to give effect to the trust by the execution of the proper assurances.

Thus, if a testator direct a sale of his lands for certain purposes, but omit to name a person to sell, the trust attaches upon the conscience of the heir, and he is as strictly bound to carry the intention into effect, as if he were the trustee regularly appointed (*a*). So, if lands be

(*a*) First clearly settled in *Pitt v. Pelham*, Freem. 134.

devised (*b*), or a sum of money be bequeathed (*c*), to a *feme covert* for her sole and separate use, but without the interposition of a trustee, the property vests at *law* in the husband, but in *equity* he holds upon trust for the separate use of the wife.

So, if the settlor do appoint a trustee, but the trustee either dies in the testator's lifetime (*d*), or is incapable of taking the estate (*e*), or otherwise fails (*f*), the trust is not thereby defeated, but fastens on the conscience of the person upon whom the legal estate has descended. "I take it," said Lord Chief Justice Wilmot, "to be a first and fundamental principle in equity, that *the trust follows the legal estate wheresoever it goes, except it come into the hands of a purchaser for valuable consideration without notice*. I never heard any distinction made, nor has any case been cited to prove, that a trust, fit and proper to be executed against a trustee, should be suffered to fall to the ground, and remain unexecuted against an heir at law, where there was no trustee. The lapse of the legal estate never has the least influence upon the trusts to which it is subject. Trust estates do not depend upon the legal estate for an existence. A court of equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the

(*b*) *Bennet v. Davis*, 2 P. W. 316; *Major v. Lansley*, 2 R. & M. 355.

(*c*) *Rollfe v. Budder*, Bunb. 187; *Prichard v. Ames*, 1 Turn. & Russ. 222; *Parker v. Brooke*, 9 Ves. 583; and see *Roberts v. Spicer*, 5 Mad. 491; *Wills v. Sayers*, 4 Mad. 409; *Rich v. Cockell*, 9 Ves. 375. At first there was some doubt: *Harvey v. Harvey*, 1 P. W. 125;

Burton v. Pierpoint, 2 P. W. 78.

(*d*) *Moggridge v. Thackwell*, 3 B. C. C. 528, *per* Lord Thurlow; *Attorney-General v. Downing*, Amb. 552, admitted.

(*e*) *Sonley v. Clockmakers' Company*, 1 B. C. C. 81; *Anon. case*, 2 Vent. 349.

(*f*) *Attorney-General v. Stephens*, 3 M. & K. 347.

legal estate or of one another ; and the legal estate is nothing but the shadow, which always follows the trust estate in the eye of a court of equity (*g*)."

We have seen in a former chapter, that powers are distributable into *arbitrary* and *imperative*, and that powers *imperative* do in reality partake of the nature of trusts. Upon this ground the Court protects a *cestui que trust* from the failure of the donee of a power imperative, as it would do from the failure of any other trustee. "If," said Lord Eldon, "the power be one which it is the duty of the party to execute—made his duty by the requisition of the will—put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not ; and the Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstance to disappoint the interests of those for whose benefit he is called upon to execute it (*h*)."

"As to the objection," said Lord Chief Justice Wilmot, "that these powers are personal to the trustees, and by their deaths become unexecutable, they are not *powers*, but *trusts*, and there is a very essential difference between them. *Powers* are never imperative—they leave the act to be done at the will of the party to whom they are given. *Trusts* are always imperative, and are obligatory upon the conscience of the party intrusted. This Court supplies the *defective execution* of powers, but never the *non-execution* of them, for they are meant to be optional. But the person who creates a trust means it should at all events be executed. The individuals named as trustees are only the nominal

(*g*) *Attorney-General v. Lady* (*h*) *Brown v. Higgs*, 8 Ves. 574.
Downing, Wilm. 21, 22.

instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are appointed at all, this Court assumes the office in the first instance, and in the event which hath happened it is the same as if no trustees had been appointed at all. There is some personality in every choice of trustees; but this personality is *res unius ætatis*, and, if the trust cannot be executed through the *medium* which was in the primary view of the testator, it must be executed through the *medium*, which the constitution has substituted in its place. A college was to be founded under the eye of five trustees: that cannot be: the death of the trustees frustrates that *medium*. What then? Must the end be lost because the means are by the act of God become impossible? Suppose the question had been asked the testator, 'If the trustees die or refuse to act, do you mean no college at all, and the heirs to take the estate?' No: I trust them to execute my intention: I do not put it into their power whether my intention shall ever take place at all (*i*)."

If trustees, then, have a *discretion* committed to them, and they either die in the testator's lifetime (*k*), or decline the office (*l*), or disagree among themselves as to the mode of execution (*m*), or do not declare themselves before their death (*n*), or from any other circumstance (*o*),

(*i*) *Attorney-General v. Lady* Finch, 53.
Downing, Wilm. 23.

(*k*) *Attorney-General v. Lady* 332; *Flanders v. Clark*, 1 Ves. 10,
Downing, Wilm. 1; *S. C. Amb.* per Lord Hardwicke; *Harding v.*
550; *Attorney-General v. Hick-* *Glyn*, 1 Atk. 469; *Ray v. Adams*,
man, 2 Eq. Ca. Ab. 193. 3 M. & K. 243.

(*l*) *Doyley v. Attorney-General*,
2 Eq. Ca. Ab. 194.

(*m*) *Moseley v. Moseley*, Rep. 4.

(*o*) *Attorney-General v. Ste-*
phens, 3 M. & K. 347.

the exercise of the power by the party intrusted with it become impossible, the Court will substitute itself in the place of the trustees, and will exercise the power by the most reasonable rule. And the Court will take up the trust, whatever difficulties or impracticabilities may stand in the way (*p*); for, as Lord Kenyon laid down the rule strongly, if the trust can *by any possibility* be exercised by the Court, the non-execution by the trustee shall not prejudice the *cestuis que trust* (*q*).

In what mode the Court will execute the power will vary according to the circumstances of the case.

Where the discretion of the trustee is to be governed by some rule, or to be measured by a state of facts, which the Court can inquire into as effectually as a private person, then the Court can "look with the eyes of trustees," and will substitute its own judgment for that of the individual.

Thus, in *Hewett v. Hewett* (*r*) a power was given to the successive tenants for life "to cut such trees and wood growing upon the premises as A., B., C., and D., or the survivors or survivor of them, should assign, allow, or direct by any writing under their hand." All the trustees died, and the difficulty was, whether the power to cut timber had not thus become extinguished; but Lord Northington said, "The trustees were interposed as supervisors only: it is absurd to suppose the testator meant his trustees should have an arbitrary volition, whether the several tenants for life should have any benefit of the fall of timber. If a bill had been brought against the trustees to assign, allow, or direct timber,

(*p*) *Pierson v. Garnet*, 2 B. C. C. 46, *per* Lord Kenyon.

(*q*) *Brown v. Higgs*, 5 Ves. 505.

(*r*) 2 Ed. 332.

mature and fit, to be cut, would it have been an answer, We do not think fit to allow it—*stat pro ratione voluntas*? I think the Court would not have been satisfied with such an answer. It is the duty of this Court, and of all Courts, to give devises, as far as their respective jurisdictions admit, their full and specific execution. The office of these trustees is *not confined to any personal qualification, but such as is general and may be substituted*, viz., to see what is fit and proper to be cut." His Lordship therefore directed a reference, what timber and wood was mature and fit, and that such should be felled with the approbation of the Master.

A power was given to trustees to apply, with the approbation of the father and mother, the dividends of certain stock to the maintenance of the children. Lord Eldon said, "The intention was that, *if it should be proper* the interest should be applied in maintenance, the trustees should have the power. In this instance there were no trustees, at least none who have been acting, and that circumstance imposes upon the Court the necessity of examining strictly what the trustees ought to have done. I shall, therefore, direct a reference to the Master, whether it would have been reasonable and proper for any trustee or trustees, acting in the execution of the will, to apply the interest towards the maintenance of the children (*u*)."

But the principal authority upon this subject is the case of *Gower v. Mainwaring* (*x*). John Mainwaring executed a trust deed, by which the trustees were to give the residue of the real and personal estate among the settlor's rela-

(*u*) *Maberly v. Turton*, 14 Ves. 499.

(*x*) 2 Ves. 87.

tions *where they should see most necessity, and as they should think most equitable and just*. Two of the trustees died, and, the third refusing to act, it was discussed, how far the discretion of the trustees could be vicariously exercised by the Court. Lord Hardwicke said, "What differs it from the cases mentioned is this, that *here is a rule laid down for the trust*. Wherever there is a trust or power,—for this is a mixture of both—I do not know the Court can put itself in the place of those trustees, and exercise that discretion. Where trustees have power to distribute *generally* according to their discretion, *without any object pointed out or rule laid down*, the Court interposes not, unless in case of a charity, which is different, the Court exercising a discretion as having the general government and regulation of charity. But *here is a rule laid down: the trustees are to judge on the necessity and occasions of the family: the Court can (y) judge of such necessity: that is a judgment to be made on facts existing, so that the Court can make the judgment as well as the trustees, and, when informed by evidence of the necessity, can judge what is equitable and just on this necessity*." And his Lordship decreed a division among the relations (such relations to be restricted to those within the Statute of Distributions) according to their necessities and circumstances, which the Master should inquire into, and consider how it might be most equitably and justly divided (z) (1).

(y) In Mr. Belt's edition of print of "*cannot judge*."
 Vesey there is the strange mis- (z) 2 Ves. 110.

(1) The execution of the power in this case in favour of the settlor's relations within the Statute of Distributions according to their necessities, leads us to consider the construction of a *direct bequest* to a person's

Where the settlor has given *no rule* or *measure* by which the discretion is to be governed, the Court cannot in that case act upon mere caprice, but will execute the

"poor or necessitous relations." The conclusion drawn from the cases in the Treatise of Powers (c. 9, s. 6) is this:—"Upon the whole, there seems great reason to contend that the true rule is, that the epithet 'poor,' 'necessitous,' or the like, is merely nugatory, although certainly there is a considerable weight of authority in favour of the contrary doctrine." It is now perfectly settled, notwithstanding a case in which Lord Hardwicke is said to have held otherwise (*Attorney-General v. Buckland*, cited 1 Ves. 231, Amb. 71), that "relations," though accompanied with the words "poor," "necessitous," or the like, will be restricted to those within the Statute of Distributions. The only question, therefore, is, whether *as among those within the statute* expressions of this kind will not be allowed their effect. In a case reported by Peere Williams (*Anon. ca. 1 P. W. 327*) the bequest was to "*poor* relations," and the Countess of Winchelsea, one of the next of kin, was allowed a share, in regard the word "poor" was frequently used as a term of endearment and compassion, rather than to signify indigence. It is evident that this case can have no application where the word "poor" is not of *doubtful* meaning, but is *clearly* to be taken in the sense of poverty and necessity. The other authority cited by Sir E. Sugden is *Widmore v. Woodroffe*, Amb. 636, "in which," Sir E. Sugden observes, "it was expressly decided by Lord Camden, that the addition of the epithet 'poor,' 'necessitous,' or the like, does not vary the case, but the will must be read as if the word denoting poverty were not in it." The testator had given a third of the residue to be distributed "amongst the most necessitous of his relations." There was *only one relation within the Statute of Distributions*, and it was held that such relation was exclusively entitled. The only point decided, therefore, was, that the addition of the term "necessitous" would not extend the construction of the word "relations" to those *out* of the statute, and to this single point were the observations of Lord Camden addressed. "Several cases," he said, "have been cited, all proceeding upon the same ground, making the Statute of Distributions the rule, to prevent an inquiry which would be infinite, and would extend to relations *ad infinitum*; the Court cannot stop at any other line. Thus it would clearly stand on the word 'relations,' and the word 'poor' being added makes no difference. There is no distinguishing between the degrees of

power by the most reasonable and intelligible rule the circumstances of the case will admit.

Upon ordinary occasions the Court proceeds upon the maxim, that *equality* is equity. Thus in *Doyley v. Attorney-General* (a) a testator gave his real and personal

(a) 2 Eq. Ca. Ab. 194. See *Down* two sets of objects were connected v. *Worrall*, 1 M. & K. 561; but the not by "and," but by "or."

poverty, and therefore the Court has, as was unanswerably argued* construed the will as if the word 'poor' were not in it." Thus there appears to be no authority for holding the words to be nugatory *as among the relations within the statute*, while on the contrary side of the question there are, as we shall see, two direct decisions. In *Brunsdon v. Woolledge*, Amb. 507, a testator gave 500*l.* to be distributed amongst his mother's *poor* relations, and Sir T. Sewell directed the fund to be distributed amongst the poor relations of the mother within the statute *who were objects of charity*. In *Mahon v. Savage*, 1 Sch. & Lef. 111, we have the authority of Lord Redesdale equally in point. A testator gave 1000*l.* to be distributed amongst his *poor* relations, or such other objects of charity as should be mentioned in his private instructions to his executors. No instructions were left, and Lord Redesdale held, that Lynam, *one of the next of kin within the statute*, was not entitled to a share, unless he was a poor person at the time of the payment of the legacy. We may also add the *dictum* of Lord Thurlow in *Green v. Howard*, 1 B. C. C. 33:—"The word 'relations,'" he said, "must be confined to the statute, but not always in the proportions of the statute: where the testator has said, to relations *according to their greater need*, the Court has shewn particular favour to one." The argument that the Court cannot distinguish between the degrees of poverty as amongst the relations within the statute is also answered by the case of *Gower v. Mainwaring*, cited in the text, in which a direction for such a distinction was actually made.

* By referring to the arguments of the counsel, it will clearly appear in what sense his Lordship meant to employ the words "there is no distinguishing between the degrees of poverty," viz. as among the relations *ad infinitum*, not as among the relations within the statute.

estate to trustees upon trust to dispose thereof to such of his relations of his mother's side who were most deserving, and in such manner as they should think fit, *and* for such charitable uses and purposes as they should also think most proper and convenient; and, the power having devolved upon the Court, Sir J. Jekyll directed, that *one moiety* of the personal estate should go to the relations of the testator on the mother's side, and the *other moiety* to charitable uses, the known rule that Equality is equity being, he said, the best rule to go by. He said he had no rule of judging of the merits of the testator's relations, and could not enter into spirits, and therefore could not prefer the one to the other, but all should come in without distinction.

For the purpose of ascertaining the class among whom this equality is to be administered, we may consider the donor's intention as framed either in the words of a *gift*, or in the words of a *power*.

If a fund be limited "upon trust for the children of A. as B. shall appoint, the construction appears to be, that the children of A. take a vested interest by the *gift*, subject to be divested by the exercise of the *power*. Therefore, on failure of the power, the children, who were the objects of the power, become absolutely entitled, just as if the discretion had never been annexed (*b*).

Where an estate is vested in trustees "upon trust to dispose thereof among the children of A.," in this case the children take nothing by way of *gift*, but the trans-

(*b*) *Davy v. Hooper*, 2 Vern. jun. 143, see 149, 150; *Jones v. 665*; *Madoc v. Jackson*, 2 B. C. C. *Torin*, 6 Sim. 255; &c.
588; *Hockley v. Mawbey*, 1 Ves.

mission of their interest must be through the *medium* of the *power*: if the trust be to distribute *equally* among the objects, the bequest, though in the form of a power, must be tantamount to a simple gift(c); but if the trustees be at liberty to distribute *unequally*, it was formerly held that the Court could not execute the power except in favour of the objects of it, who were living at the death of the donee of the power, and if no such objects were living, the fund was undisposed of. Thus, in *Maddison v. Andrew*(d), where a testator gave his wife 600*l.*, “to be by her disposed of amongst his three daughters in such proportions, and payable in such manner, as she should think fit to give it,” and Anne, one of the daughters, died, and then the testator’s widow, who was also the executrix of the deceased daughter, appointed to Anne the sum of 200*l.*, Lord Hardwicke, on the question what should become of the 200*l.*, which had not been legally appointed, observed, “There is no case where the Court has held a legacy vested when the *certainty of the sum* could not be said, as here it could not, at the death of the testator; so that it was contingent and suspended till the widow *executed* the power, or it was *at an end*. It is insisted that the clause must be construed a *gift among them equally*, subject to be divested, and the shares to be varied by the appointment; but the words of the clause will not bear it; for it is not a *gift to the daughters*, but *to the wife to give, &c.*; nor are there any words of equality. If the mother had died without appointment (in the lifetime of the three daughters) it would go equally amongst them, the power being over,

(c) *Phillips v. Garth*, 3 B. C. C. 64; *Rayner v. Mowbray*, *Ib.* 234. (d) 1 Ves. 58.

and it becoming certain and vested. If all three had died before the widow, the representative of none would take, but it would sink into the testator's estate, being only for the daughters' benefit; but in this case it survives to those who were alive at the mother's death; it not being vested subject to be divested, but contingent." The principles laid down in this case have, however, been expressly disapproved both by Lord Thurlow (*e*) and Lord Eldon (*f*); and it may now be regarded as settled that the Court will execute the power in favour of those who answered the description *at the death of the testator*, and that whether the limitation to the children was preceded or not by an estate for life (*g*). But if the power of appointment is to be exercised by *will* only, then, as in cases of this kind the objects of the power are exclusively the objects of the trust, the distribution must be confined to the children living at the death of the donee of the power (*h*).

A discretion may be given to the trustee, not only in respect of the *proportions* to be appointed, but also in respect of the *objects* to whom the appointment is to be made; as where a fund is bequeathed to trustees with a discretionary power of distribution to *such* of a class as the trustees shall think fit.

(*e*) See *Madoc v. Jackson*, 2 B. C. C. 588. *Longmore v. Broom*, 7 Ves. 124; and see *Wright v. Atkyns*, 19 Ves. 302; but see *Pope v. Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. *infra*, 593.

(*f*) See *Reade v. Reade*, 5 Ves. 748.

(*g*) *Hands v. Hands*, cited *Swift v. Gregson*, 1 T. R. 437, note, and *Phillips v. Garth*, 3 B. C. C. 69; *Kemp v. Kemp*, 5 Ves. 849; *Rayner v. Mowbray*, 3 B. C. C. 234; (*h*) *Walsh v. Wallinger*, 2 R. & M. 78; *S. C.* Taml. 425; see *Brown v. Pocock*, 6 Sim. 257.

In cases of this description the question first to be resolved is, Did the settlor intend to communicate a *mere power* or to create a *trust*?

In *Harding v. Glyn* (i) a testator gave to Elizabeth his wife a house and certain goods and chattels, but “desired her at or before her death to give the same unto and amongst *such* of the testator’s relations as she should think most deserving and approve of.” The wife died without having executed the appointment, and the Court considered the discretion as imperative, and divided the estate equally amongst the testator’s relations living at the time of the wife’s death.

In *The Duke of Marlborough v. Lord Godolphin* (k) a testator by his *will* gave 30,000*l.* to his wife, but by a *codicil* (without date) gave it to her for life only, and after her decease to be divided and distributed to and amongst *such* of his children, and in such manner and proportions, as she by deed or will should direct or appoint. The wife by will appointed 17,000*l.* between two of the children, who died in her lifetime. The sum appointed having failed by lapse, it was questioned whether it should sink into the testator’s estate, or belong to the children as *cestuis que trust*. Lord Hardwicke considered, that as the gift in the *will* was an absolute legacy to the wife, the intention of the *codicil* was not to provide for the children, but to secure their respect and duty to the wife by investing her with a power: that no interest vested in the children independently of any appointment, and therefore the sum that lapsed should fall into the residue.

(i) 1 Atk. 469, stated from Ves. 501.
Reg. Lib., *Brown v. Higgs*, 5 (k) 2 Ves. 61.

These two cases were the subject of much discussion in *Brown v. Higgs* (l), in which a testator gave certain leaseholds to John Brown upon trust (after payment of certain charges thereon,) “to employ the rents to *such* of the children of the testator’s nephew Samuel Brown, as the said John Brown should think most deserving, and that would make the best use of it, *or* to the children of the testator’s nephew William Augustus Brown, if any such there were or might be.” John Brown died in the testator’s lifetime. Lord Alvanley said, “The question is, whether the surplus rents are a gift to *all* the children, or to *such* of them only as the testator’s nephew John Brown, who died in his lifetime, should appoint. If the former can be collected as his intention, the death of the trustee will make no difference: if that intention cannot be collected, the selection not having taken place, whatever the reason of its failing may be, the bequest must fail with it. Upon the true construction of this will, I am of opinion it is equivalent to saying, he gives it to the children of Samuel Brown or of William Augustus Brown, with a power to John Brown to select any he thinks fit and to exclude the others.” His Lordship, therefore, declared the fund to have been well bequeathed in trust for *all* the children of Samuel Brown and William Augustus Brown. The cause was re-heard before his Lordship, who, after grave consideration of the subject, decreed as before (m). The decree was afterwards affirmed on appeal by Lord Eldon (n), and again affirmed in the House of Lords (o).

“*The Duke of Marlborough v. Lord Godolphin*,” said

(l) 4 Ves. 708.

(m) 5 Ves. 495.

(n) 8 Ves. 561.

(o) 18 Ves. 192.

Lord Eldon, "is certainly very difficult to reconcile with *Harding v. Glyn* or *Brown v. Higgs*; but the question is not, whether one case is to be reconciled with others, but whether all the cases have gone upon a principle which professes to save whole *Harding v. Glyn*. Lord Hardwicke in *The Duke of Marlborough v. Lord Godolphin* does not say, that, where there is a power, and it is made the duty of the party to execute it, and he would not execute it, in such a case this Court would not act, but he collected from the scope and object of the disposition taken altogether that it was a case, in which the person having a power to dispose of the sum of 30,000*l.* had a mere power, not clothed with any duty requiring her to execute it, and therefore, as to what was not disposed of, the Court could not interfere (*p*)."

In the still later case of *Birch v. Wade* (*q*) a testator gave the residue of his real and personal estate to trustees upon trust for his wife for life, and after her decease to pay one third of the interest to his brother for life, another third to his sister Charlotte for life, and the remaining third to his sister Elizabeth for life; one third of the principal to be paid at Charlotte's death amongst such of her children as she should think proper, another third to be paid on his brother's death to his brother's son, "the other third to be left entirely to the disposal of my dear and loving wife among *such* of her relations as she may think proper;" and the latter direction was held not to be a power, but a trust.

Supposing the discretion not to be *arbitrary* as a mere power, but *imperative* as a trust, the next question is, *in favour of what objects* it will be executed by the Court.

(*p*) *Brown v. Higgs*, 8 Ves. 576.

(*q*) 3 V. & B. 198.

It is observed in the "Treatise of Powers," that "in this kind of bequests, in default of appointment, the fund vests in the persons who are next of kin at the death of the donee of the power, and not in the persons who were next of kin at the death of the testator (*r*);" but the remark, it is presumed, must be applied to those cases only where, as in *Harding v. Glyn*, the donee of the power has also a life-estate in the fund, the distinction apparently being, that, where a prior vested interest is limited, the Court will execute the power in favour of the objects living when the exercise of the power is called for by the determination of the prior estate (*s*); but, where no such vested interest precedes, the Court regards not the death of the donee of the power, but executes the trust in favour of the objects living at the death of the testator (*t*).

It may be useful to inquire, upon this subject, in what manner the Court will execute a power in favour of "relations."

The *donee* of the discretion, if he have a power of *selection*, may appoint to relations in any degree (*u*), and

(*r*) Treat. Powers, c. 9, s. 6, 292; *Harding v. Glyn*, 1 Atk. 469; *S. C.* stated from Reg. Lib., *Brown* div. 2.

(*s*) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Harding v. Glyn*, 1 Atk. 469; *Cruwys v. Colman*, 9 Ves. 319, see 325; *Birch v. Wade*, 3 V. & B. 198; and see *Witts v. Boddington*, 3 B. C. C. 95; *S. C. Brown v. Higgs*, 5 Ves. 503.

(*t*) *Cole v. Wade*, 16 Ves. 27, see 48.

(*u*) *Supple v. Lowson*, Amb. 729; *Grant v. Lynam*, 4 Russ.

292; *Harding v. Glyn*, 1 Atk. 469; *S. C.* stated from Reg. Lib., *Brown v. Higgs*, 5 Ves. 501; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Cruwys v. Colman*, 9 Ves. 324, *per* Sir W. Grant; *Spring v. Biles*, cited *Swift v. Gregson*, 1 T. R. 435, note (*f*). In *Brunsdon v. Woolredge*, Amb. 507, Sir T. Sewell seems to have confined the trustees to relations within the statute, but his opinion was otherwise in *Supple v. Lowson*, *ubi supra*.

it is only in those cases where he has a mere power of *distribution* that he must confine himself to the relations within the Statute of Distribution of Intestates' Estates (*x*). But the Court, except where the bequest is for the benefit of poor relations by way of founding a charity (*y*), or the testator has furnished some intelligible rule by which the relations out of the statute may be easily ascertained (*z*), must in all cases appoint to the relations within the statute; for as on the one hand the Court cannot act arbitrarily by selecting particular objects, so on the other it cannot execute the power in favour of relations in general, for this would lead *ad infinitum* (*a*).

The only point which remains open to discussion is, in what *shares* such relations shall take—whether those who in case of intestacy would have claimed by repre-

(*x*) *Isaac v. Defriez*, Amb. 595; but see the case stated from Reg. Lib., *Attorney-General v. Price*, 17 Ves. 373, note (*a*); *Carr v. Bedford*, 2 Ch. Re. 146; *Pope v. Whitcombe*, 3 Mer. 689. The last case, and *Forbes v. Ball*, 3 Mer. 437, were both decided by Sir W. Grant, but appear to be contradictory; however, in the latter case the question raised was, not whether the donee had exceeded her power, but whether the discretion was a *power* or a *trust*; for if a power, and it had not been executed by the will, the fund would have sunk into the residue, and the plaintiff have been entitled as residuary legatee. Note, a power of

selection will be implied in the case of "relations," where it would not have been implied in the case of "children." *Spring v. Biles*, and *Mahon v. Savage*, *ubi supra*. In the latter case the words were "amongst the relations," but see *Pope v. Whitcombe*, 3 Mer. 689, where the expression was similar.

(*y*) See *White v. White*, 7 Ves. 423; *Attorney-General v. Price*, 17 Ves. 371; *Isaac v. De Friez*, Ib. 373, note (*a*); and see *Mahon v. Savage*, 1 Sch. & Lef. 111.

(*z*) *Bennett v. Honeywood*, Amb. 708.

(*a*) Thus in *Bennett v. Honeywood*, *ubi supra*, 456 persons applied as relations within two years.

sentation shall under the execution of the power by the Court take *per stirpes* or *per capita*.

Now, the rule that those should be deemed relations who would take a distributive share under the statute was adopted on the ground, that unless some line were drawn for restricting the meaning of the word, a bequest to relations would be void for uncertainty. As this was the sole foundation for appealing to the statute at all, it is evident the single inquiry for the Court is, *who* would take a distributive share: *in what proportions* they would take is wholly beside the question, and in fact beyond the Court's jurisdiction; for, when the class has been ascertained, the testator himself has determined the proportions by devising to the objects in words creating a joint tenancy.

In *Thomas v. Hole* (b) a testator gave 500*l.* "to the relations of Elizabeth Hole, *equally to be divided* between them;" and Lord King determined, that, as the testator had directed the sum to be divided equally among them, he could not direct an unequal distribution, and so decreed the brothers and nephews of Elizabeth Hole to take *per capita*.

In *Stamp v. Cooke* (c) there occurs a *dictum* of Lord Kenyon which certainly militates against this construction. "If the testator," said his Lordship, "had given to his next of kin, and stopped there, the statute would be the rule to go by; and although the nephews and nieces are not in fact so near as sisters, yet the fund would have been distributable *per stirpes* according to the statute."

But in *Phillips v. Garth* (d), where the expression was

(b) Cas. t. Talb. 251.

(c) 1 Cox, 236.

(d) 3 B. C. C. 64.

also "next of kin," a different construction prevailed. A testator gave his residuary estate to his executors, "to be *equally divided* by them to and amongst his next of kin, share and share alike;" and Mr. Justice Buller held the words "next of kin" to mean the kinsmen within the statute (e), and distributed the fund amongst the brothers and nephews *per capita*. Here, as in *Thomas v. Hole*, was the qualification "equally to be divided;" but Mr. Justice Buller did not ground his judgment upon that circumstance, but upon what he considered the established practice of the Court. "Those," he said, "must take whom the statute has pointed out, but the question is, in what shares: if it had pleased the Court originally to say that next of kin should take in the same manner as under the statute, I should not have objected to it; for it seems to me they should take *per stirpes*;" and then he cited a case, to prove that distribution *per capita* was a point which the Court had now settled. Why he should have thought the objects might originally have taken *per stirpes* he does not declare, but he afterwards added a very substantial reason why they should not, for "it is agreed," he said, "if the testator had given to his next of kin by name, they must have taken *per capita*; then the question is, whether calling them next of kin is not equal to naming them."

It was observed by Sir J. Leach upon one occasion, that Lord Eldon had disapproved of the distribution made in *Phillips v. Garth*; but this remark will, upon reference to the passage alluded to, be found to be wholly destitute of foundation. A testator had given the residue

(e) Upon this point the case *Young*, 2 M. & K. 82, reversed has been overruled by *Elmsley v. Ib.* 780.

of his estate "to be divided amongst his next of kin, as if he had died intestate." The widow claimed to be one of the next of kin, and it was argued for her, that otherwise there would be no meaning in the words "as if he had died intestate;" but Lord Eldon answered the argument by saying, "There is another construction (that will give a meaning to these words). I always had great doubt upon the case before Mr. Justice Buller, who thought those who were to take *per stirpes* as well as those taking *per capita* were included (in the expression next of kin). Lord Thurlow doubted that upon this very technical reasoning, to which his Lordship was much addicted in the construction of these instruments, that 'next of kin' being the only description (in the will) without the addition, which is in the statute, of those who represent them, the children of the deceased brothers and sisters ought not to take under that bequest. It is very difficult to say they would not have taken under *this* will (which contains the words 'as if I had died intestate'): my construction being that the next of kin should take the whole, as they would take under an intestacy (f)." The meaning of the passage therefore appears to be simply this, "I do not admit the argument for the wife, that the expression 'as if I had died intestate' would otherwise be nugatory: but for those words I think brothers and sisters only would take, notwithstanding the decision to the contrary in *Phillips v. Garth*: with the addition of those words, my construction of the will is, that nephews and nieces would be entitled equally with the nearest of kin (g)."

(f) *Garrick v. Lord Camden*,
14 Ves. 385.

(g) And see *Wright v. Atkyns*,
Coop. 119.

We cannot cite a higher authority upon this subject than the opinion of Lord Thurlow. "The term 'relations,'" observed his Lordship, "must be confined to the statute; but the Court has said in the same moment, that the claimants shall not always take in the *proportions* of the statute, but as the testator had directed; as where there have been brothers and brothers' sons, these last took *not by representation*, but *per capita* (*h*)."

And in conformity with this *dictum* was decided by his Lordship the case of *Rayner v. Mowbray* (*i*). A testator devised an estate to A. upon trust to sell and "to divide and pay the proceeds to and among all and every such person and persons who should appear to be related to the testator, share and share alike." The testator left three sisters surviving, and five nieces, the daughters of a deceased sister, and Lord Thurlow directed the distribution to be made among the eight next of kin *per capita*(*k*).

In *Pope v. Whitcombe* (*l*), which was heard before Sir W. Grant, a testator gave the residue of his estate to his wife for life, and directed her to dispose thereof (in an event which occurred) "amongst the testator's relations in such manner as she should think fit." The wife died without having executed the power, and the next of kin at the testator's death were a brother and two nephews. The Court, says the reporter, decreed one moiety to the brother, and the other to the representatives of the nephews. The authority of so great a lawyer as Sir W.

(*h*) *Green v. Howard*, 1 B. C. C. 33. which does not appear in the report, see Reg. Lib. B. 1791, fol. 183.

(*i*) 3 B. C. C. 234.

183.

(*k*) For the mode of distribution

(*l*) 3 Mer. 689.

Grant would almost have decided the question ; but, on reference to the Registrar's book, it appears a very different order was made. The two nephews had died in the lifetime of the widow, and at her death the only surviving next of kin of the testator was the brother. The brother died and appointed executors, and the Court decreed the residuary estate "to the executors of the brother, the next of kin of the testator." *Pope v. Whitcombe* therefore is no authority upon the point in discussion.

The bequest in *Hinckley v. Maclarens* (m) was, that the testator's property "should be *equally divided* among his next of kin," and Sir John Leach directed the distribution among the next of kin to be made *per stirpes*. A similar decree was afterwards made by him in the case of *Elmsley v. Young* (n). But the decision in these two cases was *directly contradictory* to *Thomas v. Hole*, *Rayner v. Mowbray*, and *Phillips v. Garth*. His Honor seems not to have been apprised of the point determined in the two former cases ; and, with respect to *Phillips v. Garth*, he laboured under the erroneous impression, that Lord Eldon had expressed his disapprobation of that case (1).

(m) 1 M. & K. 27.

(n) 2 M. & K. 82.

(1) Two cases usually cited upon this subject have been omitted as irrelevant to the point. In *Masters v. Hooper*, 4 B. C. C. 207, the testator left two nephews, and two nieces, and two great-nephews, and a great-niece, and, as there is no representation under the statute beyond brothers' and sisters' children, the great-nephews and great-niece were excluded, and the distribution was made *per capita* among the nephews and nieces. Reg. Lib. 1792. B. fol. 209. In *Lowndes v. Stone*, 4 Ves. 649, a testator gave the residue of his property "to his next kin or heir at law, whom he appointed his executor." By "next kin, or heir at law" was

Upon striking a balance of the foregoing authorities, the just conclusion appears to be, that in a gift to "relations," whether the testator has added the words "equally to be divided," or not, the distribution among the relations within the statute must be made *per capita*, and not *per stirpes*. The question with respect to "next of kin" can no longer arise; for by the decision of *Elmley v. Young*, upon appeal from Sir J. Leach to the late Lords Commissioners (o), the words "next of kin" must be construed to mean "nearest of kin," to the exclusion of those who would take under the statute by representation.

We have stated that, as a general principle, the Court will execute the power among the objects *equally*; but it sometimes happens that the subject of the gift is incapable of division, or the settlor has expressly directed the whole to be assigned to *one* object to be selected by the trustee. In such cases the Court still acts upon the maxim, that, if *by any possibility* the power can be executed, the Court will do it.

In *Moseley v. Moseley* (p), a very early case, an estate was devised to trustees upon trust to settle on *such* of the sons of N. as the trustees should think fit. The trustees having neglected to comply with the direction, the sons of N. filed a bill to have the benefit of the trust, and the Court decreed the trustees, within a fortnight next after the entry of the order, to nominate such one of

(o) 2 M. & K. 780.

cited *Clarke v. Turner*, Freem.

(p) Rep. i. Finch, 53; S. C. 199.

evidently intended some individual, but, as there was no one to answer the description, the result was an *actual intestacy*. The case does not appear in Reg. Lib.

the plaintiffs as they should think fit, upon whom to settle the lands of the testator ; and if the trustees should fail to nominate within that time, or there should be any difference between them concerning such nomination, then the Court would nominate one of the plaintiffs, it being the testator's intent that his estate should not be divided, but settled upon one person.

In *Richardson v. Chapman* (q) Dr. Potter, Archbishop of Canterbury, gave all his options to trustees upon trust, that in disposing thereof " regard should be had according to their discretions to his eldest son, his sons in law, his present and former chaplains, and others his domestics, particularly Dr. T., his chaplain, and Dr. H., his librarian ; also to his worthy friends and acquaintance, particularly to Dr. Richardson. The trustee tried first to give the option in question to himself. He then fixed upon a person, with whom he appeared to have made an underhand bargain. When this failed, he, in breach of his duty, presented a Mr. Venner. On a bill filed to set aside the presentation, Lord Northington considered the trust to be of a kind that the Court could not execute, and dismissed the bill. Dr. Richardson appealed against this decision to the House of Lords, and the other person, who stood prior to him, not appearing, the House reversed the decree, and ordered the presentation to be made to the appellant. " This case," says Lord Alvanley, " shews, that, however difficult it may be to select the persons intended, and though it must depend from the nature of the trust upon the opinion of the trustees as to the merit of the persons who are the objects, yet the Court will execute even a trust of that nature, if the trustee shall either neglect to execute, or be disabled

(q) 7 B. P. C. 318 ; S. C. cited *Brown v. Higgs*, 5 Ves. 504, 505.

from executing, or shows by his conduct any intention not to execute it as the testator intended he should. When one reads the nature of this trust, how difficult it was to make the selection, it is decisive to shew the Court must do it, though the trust is in its nature so discretionary (r)."

In *Brown v. Higgs* (s) an estate was devised "to one of the sons of Samuel Brown, as John Brown should direct by a conveyance in his lifetime, or by his last will and testament;" and, John Brown not having executed the power, Lord Alvanley was inclined to think, though he would not decide the point, that the children of Samuel Brown could not establish a claim: but the ground of this opinion was not that a *trust* had been created which the Court could not execute, but that the intention of the testator as collected from the will was to communicate a *mere power*.

(r) *Brown v. Higgs*, 5 Ves. 504.

(s) 4 Ves. 708, see 718, 719 ;
5 Ves. 495, see 508.

CHAPTER XXVII.

THE RIGHTS OF THE CESTUI QUE TRUST IN PREVENTION OF
A BREACH OF TRUST.

AS the estate of the *cestui que trust* depends for its continuance upon the faith and integrity of the trustee, it is reasonable the *cestui que trust*, whose interest is thus materially concerned, should be allowed by all practicable means to secure himself against the occurrence of any act of misconduct. We shall, therefore, next consider the rights of the *cestui que trust* that have a tendency to secure to him this protection.

I. The *cestui que trust* is entitled to have the custody and administration of the estate confided to the care both of *proper persons* and of a *proper number* of such persons.

Thus, if the trustee originally appointed happen to die in the testator's life-time, the *cestui que trust*, where such a course would be for his interest, may have the property better secured by a conveyance to an express trustee for himself. A testator had devised his real estate to A., his executors, administrators, and assigns, for a term of 2000 years upon certain trusts, with remainders over. A. died in the life-time of the testator,

and the Court referred it to the Master to appoint a new trustee, and to approve of a demise or lease for the term of 2000 years upon the trusts of the will; but directed that, as only one trustee had been nominated by the testator, one only should be appointed by the Master (a).

So, where the original number of trustees has become reduced by deaths, the *cestui que trust* may restore the property to its original security by the appointment of new trustees in the place of the trustees deceased (b).

If a trustee become so circumstanced that he cannot effectually execute the office, as if a *feme* trustee marry (c); or if the trustee misconduct himself in any manner, as if he suffer a co-trustee to violate his duty (d), or if he abscond on a charge of forgery (e); in these and the like cases the *cestui que trust* may have the old trustee removed, and a new trustee appointed in his room. And in such a suit it will not be scandalous or impertinent to challenge a trustee for misconduct, or to impute to him any corrupt or improper motive in the execution of the trust, or to allege that his behaviour is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation; but it will be impertinent, and may be scandalous, to state circumstances of *general* malice or personal hostility (f). And if the old trustee be removed on the ground of misconduct, he

(a) *Devey v. Peace*, Taml. 77; Ves. 592.

and see *Denyer v. Druce*, Taml. 37.

(d) *Ex parte Reynolds*, 5 Ves. 707.

(b) *Buchanan v. Hamilton*, 5 Ves. 722; *Hibbard v. Lambe*, Amb. 309.

(e) *Millard v. Eyre*, 2 Ves. jun. 94.

(f) *Earl of Portsmouth v. Fel-lows*, 5 Mad. 450.

(c) *Lake v. De Lambert*, 4

must bear the expense of the conveyance to the new trustee, as an act necessitated by himself (*g*).

If the settlement require the trustees to be inhabitants of a particular place, and the present trustees do not answer that description, the *cestui que trust* may, it seems, procure their removal, provided at the time of the election there were any inhabitants proper to be trustees, and who ought, therefore, to have been appointed (*h*).

But the Court will not dismiss a trustee for the mere caprice of the *cestui que trust* without any reasonable cause shewn (*i*), nor even if the trustee have transgressed the strict line of his duty, provided there was no wilful default, but merely a misunderstanding (*k*). Where, however, a trustee pertinaciously insisted on being continued in the office, though his co-trustees were unwilling to act with him, Lord Nottingham said, "He liked not that a man should be ambitious of a trust when he could get nothing but trouble by it," and, without any reflection on the conduct of the trustee, declared he should meddle no further in the trust (*l*).

The application to the Court, whether for the appointment of an original trustee, or the removal of one trustee and the substitution of another, must, except in the instance provided for by the late Trustee Act (*m*), be made formally by *bill* (*n*); but if a suit be already pending, a new trustee may then be appointed, either on petition or

(*g*) *Ex parte Greenhouse*, 1 Mad. 92.

(*h*) *Attorney-General v. Cowper*, 1 B. C. C. 439.

(*i*) *O'Keeffe v. Calthorpe*, 1 Atk. 18.

(*k*) See *Attorney-General v. Coopers' Company*, 19 Ves. 192.

(*l*) *Uvedale v. Eitrick*, 2 Ch. Ca. 130.

(*m*) See *supra*, p. 473.

(*n*) See *ex parte Anderson*, 5 Ves. 243; *in re Fitzgerald*, Lloyd & Goold, 22; *in re Anderson*, Id.

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motion (*o*). But the Court will not appoint a trustee without an inquiry by the Master whether the party proposed be a proper and fit person (*p*): even where the settlement contains a power of appointment of new trustees, and the donee of the power nominates a person and proposes him to the Court, there must be a reference to the Master as to the propriety of the choice (*q*); but where the amount of the property is small, an order may be made for the Master to appoint at once without *coming back* to the Court (*r*). The trustee named by the Master may be excepted to as improper, but not on the ground that other persons would be more proper, for the Court cannot enter into the consideration of comparative fitness (*s*). A *cestui que trust*, who is *exclusively interested* in a trust fund, and petitions for a transfer under Sir E. Sugden's Trustee Act, may obtain an order for the appointment of a new trustee and a transfer of the property to that trustee without a reference (*t*).

It must be observed, that the substitution of a trustee by the Court is not a complete substitution to all intents and purposes; for any *special power*, with which the original trustee was invested, is not exercisable by the new trustee, unless the settlor himself has declared an intention to that effect (*u*).

In *Drayson v. Pocock* (*x*) a testator gave all his real

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| (<i>o</i>) — v. <i>Osborne</i> , 6 Ves. | 2 S. & S. 528. |
| 455; — v. <i>Robarts</i> , 1 J. & W. | (<i>t</i>) <i>Ex parte Shick</i> , 5 Sim. 281. |
| 251. | (<i>u</i>) <i>Doyley v. Attorney-General</i> , |
| (<i>p</i>) <i>O'Keeffe v. Calthorpe</i> , 1 | 2 Eq. Ca. Ab. 194; <i>Hibbard v.</i> |
| Atk. 18, <i>per</i> Lord Hardwicke. | <i>Lambe</i> , Amb. 309; and see <i>Cole v.</i> |
| (<i>q</i>) — v. <i>Robarts</i> , 1 J. & W. | <i>Wade</i> , 16 Ves. 44, 47. |
| 251. | (<i>x</i>) 4 Sim. 283; Reg. Lib. A. |
| (<i>r</i>) <i>Attorney-General v. Earl</i> | 1830, f. 1397, under the title of |
| <i>of Arran</i> , 1 J. & W. 229. | <i>Drayson v. Jones</i> . |
| (<i>s</i>) <i>Attorney-General v. Dyson</i> , | |

and personal estate to two trustees, their heirs, executors, &c., in trust to sell, and directed that "the receipt or receipts of the said trustees respectively (*y*)" should be sufficient discharges. Both the trustees died, and a *cestui que trust* filed a bill to have new trustees appointed, and, the Master having approved of Jones and Pocock, the heir of the surviving trustee executed a conveyance to them of the estate upon the trusts of the will. The new trustees contracted for the sale of the estate, and the purchaser filed a bill for specific performance, alleging that Jones and Pocock, the substituted trustees, had no power to sign a discharge for the purchase money. The Vice-Chancellor held, that "the effect of the conveyance to the new trustees was to bind the legal estate, and the decree of the Court bound the equity, so that the new trustees had the same power to give receipts as the original trustees had."

In this case the power of signing receipts was no part of the trust, as such, but was strictly and properly a *power*. Had the original trustees executed a conveyance to the new trustees without the direction of the Court, the power, being one of personal confidence, would not have passed with the estate (*z*), and why the decree of the Court should have had any ulterior operation does not readily appear. The decision, if we look to principle, must be regarded as doubtful.

As the substitution of a trustee by the Court proceeds upon the merits of the case investigated in a regular suit, and is never without a reference to the Master respecting the fitness of the person proposed, it cannot be expected

(*y*) Reg. Lib.

2 Eq. Ca. Ab. 194; and see *Cole*

(*z*) *Crewe v. Dicken*, 4 Ves. v. *Wade*, 16 Ves. 44, 47.

97; *Attorney-General v. Doyley*,

that the Court should authorize the insertion of a power in the conveyance to the new trustees enabling them to nominate other trustees in their stead as often as occasion may require; this would plainly be an abandonment by the Court of its own jurisdiction—a delegation of it to the care and judgment of individuals (*a*). It seems, however, to have been sometimes done in cases of charities (*b*).

We have spoken of the *cestui que trust's* right to insist on the appointment of proper trustees by application to a court of equity; but it is usual to guard against the necessity of resorting to such an expensive process in certain cases by the insertion of a special proviso in the instrument creating the trust. The occurrences generally provided for are the death, or incapacity, or unwillingness to act of any trustee, and upon either of these events the donee of the power, who is commonly one of the *cestuis que trust*, or the surviving or continuing trustee, his executor or administrator, is authorized to fill up the trust by the nomination of a new trustee. But whether the appointment be sought by application to the Court, or has been provided for by a special power in the trust deed, no complete substitution can be made without a transfer of the legal interest (*c*). Where, therefore, the trust property is vested in a person who is incapable of passing it, or who cannot be found, &c., recourse must be had to the remedial enactments of the late Trustee Act (*d*). If a power of appointment of new trustees was

(*a*) *Bayley v. Mansell*, 4 Mad. A. 1791, f. 487; see the decree, 226; *Southwell v. Ward*, Taml. stated Seton's Dec. 130.

314; but see *Joyce v. Joyce*, 2 Moll. 276. (*c*) See *Foley v. Wornner*, 2 Jac. & Walk. 248.

(*b*) *Attorney-General v. Hurst*, (d) 11 G. 4 & 1 W. 4, c. 60.
M. R. 2d Dec. 1791, Reg. Lib.

contained in the instrument creating the trust, the new trustee may be nominated by act *in pais*, and the transfer of the property may be ordered under the statute upon *petition*, and then, by the express declaration invariably subjoined to the proviso in the settlement, the new trustee may exercise all the same powers, as if he had been originally appointed. If the appointment of new trustees was not provided for in the trust deed, although in the ordinary course of equity the substitution of a new trustee cannot be applied for without the institution of a *suit*, yet, by a special clause in the Trustee Act (e), it is declared, that “where, *upon application by petition under that Act*, the recent creation or declaration of the trust or other circumstances may render it safe and expedient,” the Court may appoint new trustees by an order made on *a petition presented for a conveyance or transfer under that Act*. However, a trustee substituted by the Court cannot, as we have seen, exercise the *special* powers committed by the settlor to the original trustees, and no clause or implication in the statute has invested him with such an authority.

II. The *cestui que trust* is entitled to file a bill against his trustee, and oblige him to the execution of any particular act of duty. Thus, if the legal estate in the hands of the trustee be assailed by a stranger, the *cestui que trust* may compel the trustee to assert his legal right (f): should the trust property be lost, and the trustee himself become insolvent, the *cestui que trust's* equitable interest would be absolutely destroyed.

Sir Joseph Jekyll laid down the rule, that “the for-

(e) Sect. 22.

(f) *Foley v. Burnell*, 1 B. C. C. 277, *per* Lord Thurlow.

bearance of the trustees in not doing what it was their office to have done should in no sort prejudice the *cestui que trust* (g);” and thence it has been inferred that a right gained by a stranger through the neglect of the trustee shall be no bar in equity to the claim of the *cestui que trust*; but the principle was evidently intended to apply as between the privies to the trust only, and not as between the privies to the trust and a stranger.

“The rule, that the Statute of Limitations does not bar a trust estate,” said Lord Hardwicke, “holds only as between *cestui que trust* and trustee, not between *cestui que trust* and trustee on the one side, and strangers on the other, for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the Act would never take place. Therefore, where a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both (h).” “A *cestui que trust*,” said Lord Redesdale, “is always barred by length of time operating against the trustee. If the trustee does not enter, and the *cestui que trust* does not compel him to enter, as to the person claiming paramount the *cestui que trust* is barred (i).” And Lord Manners observed, “The opinion of Sir J. Jekyll, if intended to apply to third persons, which I do not conceive it was, has often been denied, and is contrary to many decisions. If the trustees who are so appointed neglect their duty, and suffer an adverse possession of twenty years to be held, I apprehend the Statute of Limitations is a bar to the *cestui que trust* (k).”

(g) *Lechmere v. Earl of Carlisle*, 3 P. W. 215.

(h) *Lewellin v. Mackworth*, 2 Eq. Ca. Ab. 579.

(i) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629.

(k) *Pentland v. Stokes*, 2 B. & B. 75. In this case the *cestui que*

In *Allen v. Sayer* (*l*), as corrected from the Registrar's Book, a testator gave his real estate after his mother's and wife's decease to Allen, then an infant, his heirs and assigns, and by the same will gave his real estate to A. B. and C. D. upon trust, if occasion should be, to sell the same in aid of the personal estate for payment of debts, and appointed his wife and mother the executrixes of his will. The wife renounced, and the mother only proved. Shortly after the testator's decease, which happened about 1678, the trustees of the will not offering to interfere, and Allen being an infant of the age of ten years, and the testator's mother of great age, and therefore averse to any dispute, one Sayer, who was connected with the family by marriage, and pretended a claim to the lands, prevailed with Curtis, the tenant in possession under a lease for years, to attorn and pay rent to himself, and gave him a bond of indemnity. Sayer then levied a fine of the lands with proclamations, and five years passed and no entry was made. In 1688 the testator's mother died, and the right of Allen, the infant, to the possession then accrued. About 1689 the infant attained his age of twenty-one years, and in 1690 brought an ejectment at law, but failed. Upon this he instituted a suit in equity, and Lord Somers decreed, that "the fine and non-claim should not incur against the plaintiff, who was then an infant;" and his Lordship is reported by Vernon to have said, that "although the fine and non-claim was a good bar at law, the legal estate being in the

trust was part of the time an infant, and as Lord Manners expressed a general opinion, it would seem he concurred in the doctrine, that an infant is bound as well as an adult.

(*l*) 2 Vern. 368. See the case stated from Reg. Lib., Appendix, No. 5.

trustees, who were of full age and ought to have entered, yet the plaintiff ought not to suffer for their *laches*, being an infant, and who, so soon as of age, made entry, and brought his ejectment, and likewise his bill in that court, before five years had incurred after he had attained his age." Thus Lord Somers seems to have decided that the right of an infant *cestui que trust* cannot be barred by the *laches* of his trustee; but it must be remarked, 1. That the legal fee was in the trustees, both by force of the word "estate," and also from the trust to sell, and therefore the infant could not have maintained an action at law, independently of the fine and non-claim. 2. It is not clear that the conusor, when he levied the fine, was seised of the freehold; for he had merely the attornment of the tenant, and this of itself would not work a disseisin (*m*). 3. The interest of the infant was subject to the prior life estate in the same lands of the testator's mother, and it is not *said*, however *probable*, that this estate was taken under the *will*: if it was an estate prior to the testator's interest, then, as the mother did not die till 1688, the right of entry of the infant, or rather of the devisees in trust for him, was not barred until five years after the reversion had fallen into possession, within which period of time the suit in equity was instituted. 4. The conusor of the fine had contrived to get into possession of the land through the *fraud and collusion of the tenant*, to whom he had given a bond of indemnity, and it cannot be disputed, that, where the conusor's estate was originally infected with fraud, the fine and non-claim can have no effect in removing the blot (*n*). It may be thought, perhaps, that, allowing Sayer to have gained the freehold by disseisin, yet, as he came in by an un-

(*m*) See Co. Lit. 322b, 325a. Sch. & Lef. 379, 381; *Salsbury*

(*n*) See *Kennedy v. Daly*, 1 v. *Bagott*, 2 Sw. 612.

lawful title, *with notice of the trust*, he would himself become a trustee, and so could not bar the interest of the person for whom he held; but a disseisor, before the statute of H. 8, was not bound by a use, and therefore, by analogy to uses, a disseisor ought not at the present day to be bound by notice of a trust. It was resolved by all the Judges, in *Sir Moyle Finch's case*, in the reign of Elizabeth, that "a disseisor was subject to no trust, nor any *subpoena* was maintainable against him, not only because he was in the *post*, but because the right of inheritance or freehold was determinable at the common law, and not in Chancery, neither had the *cestui que use* (while he had his being) any remedy in that case (o)." And we may add the authority of Sir E. Sugden, who, in his edition of Gilbert on Uses, observes, "At this day every one is bound by a trust who obtains the estate without a valuable consideration, or even for a valuable consideration if with notice, unless perhaps the lord by escheat. But persons claiming the legal estate by an actual disseisin, without collusion with the trustee, will not be bound by the trust. Therefore, if I oust A., who is a trustee for B., and a claim is not made in due time, A. will be barred, and his *cestui que trust* with him, although I had notice of the trust." (p) (1).

In *The Earl v. The Countess of Huntingdon* (q) Lord Macclesfield was of opinion, that a fine and five years' non-claim would, in favour of a *purchaser*, bar a trust

(o) *Sir Moyle Finch's case*, 4 429.

Inst. 85.

(q) Cited *Wyck v. East India*

(p) Gilb. on Uses, Sugd. 'ed. *Company*, 3 P. W. 310. note (G).

(1) And an outstanding term in a trustee will attend the inheritance gained by the disseisin. *Reynolds v. Jones*, 2 Sim. & Stu. 206.

term, though the *cestui que trust* was an infant. In *Wych v. The East India Company* (r) A. had agreed with the Company for an allowance of two per cent., and afterwards died intestate, leaving an infant son. B. took out administration *durante minoritate*, but instituted no suit upon the contract. The son, within six years after he had attained his age, but not within six years after the cause of action accrued, brought his bill against the Company for an account, and they pleaded the Statute of Limitations. Lord Talbot said, "The administrator, during the infancy of the plaintiff, had a right to sue; and though the *cestui que trust* was an infant, yet he must be bound by the trustee's not suing in time; for *I cannot take away the benefit of the Statute of Limitations from the Company, who are in no default, and are entitled to take advantage thereof as well as private persons, since their witnesses may die, or their vouchers be lost. And as to the trust, that is only between the administrator and the infant, and does not affect the Company.*" Perhaps, therefore, we may venture to conclude, that an infant *cestui que trust*, where there is no imputation of fraud, will be bound by a legal bar incurred through the *laches* of his trustee.

If a tenant for life of leaseholds be bound to renew, and by his threats or acts manifest an intention not to renew, the remainder-man may file a bill, and have a receiver appointed for the purpose of providing the renewal fine out of the rents and profits of the estate; and if the period of renewal have already expired, a receiver may be appointed on proof of the tenant-for-life's default (s).

(r) 3 P. W. 309.

(s) See *Bennett v. Colley*, 5 Sim. 192; *S. C.* 2 M. & K. 233.

In one case, where a suspicion was entertained that the trustee would not fairly execute his trust, the Court required of him, if he continued in the office, to enter into securities for his good faith (*t*); and generally a *cestui que trust*, though entitled to a mere contingent benefit, may, upon reasonable cause shewn, apply to the Court to have his interest properly secured (*u*).

III. As the *cestui que trust* may compel the trustee to the observance of his duty, so, on the other hand, if the *cestui que trust* have reason to suppose, and can prove to the satisfaction of the Court, that the trustee is about to proceed to an act that is not authorized by the true scope of the trust, he may obtain an injunction from the Court to restrain the trustee from such a wanton exercise of his legal power.

It is clear the *cestui que trust* would be entitled to an injunction where the act in contemplation would, if done, be irremediable (*x*); but in *Pechel v. Fowler* (*y*), a case in the Exchequer, it is said to have been held, that a *cestui que trust* could not restrain an improvident sale by the trustee, because the *cestui que trust* might proceed against the trustee for the consequential damage to the estate, and so the injury was not irreparable; but Sir J. Leach under similar circumstances granted an injunction (*z*); and other authorities are not wanting in support of so just and reasonable a right (*a*).

(*t*) *Keeling v. Child*, Rep. t. *The Foundling Hospital*, 2 Ves. Finch, 360. jun. 42.

(*u*) *Cole v. Moore*, Mo. 806. (*y*) 2 Anst. 549.

(*x*) See *Corporation of Ludlow* (*z*) *Anon. case*, 6 Mad. 10.

v. Greenhouse, 1 B. N. R. 57; (*a*) See *Webb v. Earl of Shaftesbury*, 7 Ves. 487, 488; *Reeve v. 279, 281; Attorney-General v. Parkins*, 2 J. & W. 390.

CHAPTER XXVIII.

THE REMEDIES OF THE CESTUI QUE TRUST IN THE EVENT
OF A BREACH OF TRUST.

UPON this subject we shall consider, 1. The right of the *cestui que trust* to follow the estate into the hands of a stranger, to whom it has tortiously been conveyed; 2. The remedy against the trustee personally by way of compensation for the mischievous consequences of the act; and, 3. The mode and extent of redress in breaches of trust committed by trustees of charities.

I. Of following the estate into the hands of a stranger.

The rule is, that a *cestui que trust* may follow the estate specifically into the hands of any person who is either a volunteer, whether with or without notice, or a purchaser for valuable consideration with notice. But against a purchaser for valuable consideration without notice, or against his alienee, whether a volunteer or purchaser, and whether with notice or without, or against a purchaser without notice from a purchaser with notice, the *cestui que trust* is barred from prosecuting his claim (a).

Upon this right of the *cestui que trust* against the

(a) See *supra*, p. 205.

grantee of the estate we shall enter upon two questions:

1. Within what limits of time the *cestui que trust* may be allowed to institute proceedings for the recovery of his right; and, 2. To what extent, and under what circumstances, the Court will order an account of the *mesne* rents and profits.

1. As to the limitation of time within which the suit must be instituted.

It is a well-known rule, that, as between *cestui que trust* and trustee in the case of a *direct trust*, no length of time is a bar; for, from the privity existing between them, the possession of the one is the possession of the other, and there is no adverse title (*b*). It has hence been argued, that, as the person into whose hands the estate is followed is also by construction of law a trustee, the *cestui que trust* is entitled to the benefit of the rule, and is not precluded by mere lapse of time from establishing his claim; but the authorities to the contrary are clear and express, and cannot leave a doubt (*c*).

“It is certainly true,” said Sir W. Grant, “that no time bars a *direct trust*; but if it is meant to be asserted that a court of equity allows a man to make out a case of *constructive trust* at any distance of time after the facts

(*b*) See *Chalmer v. Bradley*, 1 *Weldman*, 1 Ch. Ca. 26; *Lord J. & W.* 67; *Bennett v. Colley*, 2 *Hollis's case*, 2 Vent. 345; *Earl of M. & K.* 232; *Llevellyn v. Mackworth*, Barn. 449; *Wilson v. of Pomfret v. Windsor*, 2 Ves. 484; *Hargreaves v. Michell*, 6 *Moore*, 1 M. & K. 146; *Townshend v. Townshend*, 1 B. C. C. 1 Vin. Ab. 185. 554; *Hamond v. Hicks*, 1 Vern. 432; *Norton v. Turvill*, 2 P. W. 144; *Attorney-General v. Mayor of Exeter*, Jac. 448; *Heath v. Henly*, 1 Ch. Ca. 20; *Sheldon v.*

(*c*) *Townshend v. Townshend*, 1 B. C. C. 550, see 554; *Bonney v. Ridgard*, 1 Cox, 145; *Andrew v. Wrigley*, 4 B. C. C. 125; *Lockey v. Lockey*, Pr. Ch. 518.

and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be : so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but *where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief (d).*" And Lord Redesdale observed, " The position that *trust* and *fraud* are not within the statute must be thus qualified : that if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust* ; and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar, because *his possession is according to his title* : but the question of *fraud* is of a very different description ; that is a case where a person who is in possession by virtue of the fraud is *not in the ordinary sense of the word a trustee, but is to be constituted a trustee by a decree of a court of equity founded on the fraud ; and his possession in the mean time is adverse to the title of the person who impeaches the transaction on the ground of fraud (e).*"

As the remedy of the *cestui que trust* is considered, therefore, on the footing of any other equitable right, it may be proper to examine briefly how the lapse of time operates generally upon suits for equitable relief.

To claims in equity there appear to be but three

(d) *Beckford v. Wade*, 17 Ves. 97.

(e) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633.

bars :—1. A statute of limitation ; 2. The presumption of something done which, if done, is subversive of the plaintiff's right ; 3. The ground of public policy or the inconvenience of the relief.

1. Wherever there is a statutable bar at *law*, the same period is by analogy, or rather in obedience to the statute, adopted as a bar in *equity* (f).

The language of Lord Camden upon this subject has been admired as peculiarly energetic. "A court of equity," he said, "which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this Court into activity but *conscience*, *good faith*, and *reasonable diligence*. Where these are wanting, the Court is passive, and does nothing. *Laches* and neglect are always discountenanced ; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits. But as the Court had no legislative authority, it could not properly define the time of bar by a *positive rule* to an hour, a minute, or a year : it was governed by circumstances. But as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity ; for when the legislature had fixed

(f) See *ex parte Dewdney*, 15 Ves. 496; *Bonney v. Ridgard*, 1 Cox, 149; *Beckford v. Wade*, 17 Ves. 97; *Townshend v. Townshend*, 1 B. C. C. 554; *Aggas v. Pickerell*, 3 Atk. 225; *Belch v. Harvey*, Appendix to Vend. and Purch. No. 15; *White v. Ewer*, 2 Vent. 340; *Knowles v. Spence*, 1 Eq. Ca. Ab. 315; *Pearson v. Pulley*, 1 Ch. Ca. 102; *Johnson v. Smith*, 2 Burr. 961; *Attorney-General v. Mayor of Exeter*, Jac. 448.

the time at *law*, it would have been preposterous for *equity*, which, by its own proper authority, always maintained a limitation, to countenance *laches* beyond the period that *law* had been confined to by parliament; and therefore in all cases, *where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar (g).*" And Lord Redesdale to the same purpose observed, "It is said that courts of equity are not within the statutes of limitations. This is true in one respect: they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language to say that courts of equity act merely by *analogy* to the statutes: they act in *obedience* to them (*h*)."¹ And again, "I think the statute must be taken *virtually* to include courts of equity; for when the legislature has by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed law; and therefore it must be taken to have virtually enacted in the same cases a limitation for courts of equity also (*i*);"² and his Lordship then lays down the rule, that "if the *equitable* title be not sued upon within the time that a *legal* title of the same nature ought to be sued upon, the Court, acting by analogy to the statute, will not relieve. If the party be guilty of such *laches* in prosecuting his *equitable*, as

(g) *Smith v. Clay*, cited in note 2 Sch. & Lef. 630.
 to *Deloraine v. Browne*, 3 B. C. C. (i) *Ib.* 631; and see *Marquis of Cholmondeley v. Lord Clinton*, 639.
 (h) *Hovenden v. Lord Annesley*, 2 J. & W. 192.

would bar him if his title were solely at law, he shall be barred in equity (*k*).” And the same doctrines have been repeatedly recognised by the highest authorities, amongst whom we may mention particularly Lord Manners (*l*) and Sir T. Plumer (*m*).

Upon these principles, then, an *equitable* claim to *lands* cannot be preferred after a lapse of twenty years; for though to writs of right and to *formedons* much longer periods were allowed at law, yet equity always looked upon these as peculiar and excepted cases, and guided itself rather by analogy to the statute of James, which fixed the limitation to the prosecution of rights of entry (*n*). But at law, it must be observed, the remainder-man’s right begins not to run before the determination of the particular estate: in equity it commences from the date of the transaction sought to be impeached; for the remainder-man, or even the claimant of a mere contingent interest, may file a bill to re-establish his right from the first moment of the breach of trust (*o*).

Upon the subject of a statutory bar it must be noticed, that the limited period affords a substantive insuperable obstacle to the plaintiff’s claim, and no plea of poverty, ignorance, or mistake, can be of any avail: however clear and indisputable the title, could the merits be inquired into, the limited time has elapsed, and the door of justice is closed (*p*). If the Court could relieve after

(*k*) *Bond v. Hopkins*, 1 Sch. & Lord Clinton, 2 J. & W. 192.

Lef. 429.

(*o*) *Andrew v. Wrigley*, 4 B. C. C.

(*l*) *Medlicott v. O’Donel*, 1 125.

B. & B. 166.

(*p*) *Marquis of Cholmondeley v.*

(*m*) *Marquis of Cholmondeley*

Lord Clinton, 2 J. & W. 139, *per*

v. Lord Clinton, 2 J. & W. 151.

Sir T. Plumer; *Byrne v. Frere*, 2

(*n*) *Marquis of Cholmondeley v.*

Moll, 171, 178, *per* Sir A. Hart.

twenty years on the ground of distress, or any similar plea, so might it after thirty, forty, or fifty : there would be no limitation, and property would be thrown into confusion (*q*).

But no time will cover a fraud *so long as it remains concealed*, for, until discovery, the title to avoid the transaction does not properly arise (*r*). But, *after discovery*, the defendant may avail himself of the statute, for he has a right to say, "You shall not bring this matter under discussion at this distance of time : it is entirely your own neglect that you did not do so within the period limited by the statute (*s*)."

The defendant may avail himself of the Statute of Limitations, when the bar to the claim appears on the face of the bill, by demurrer (*t*) : when it does not

(*q*) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 640.

(*r*) *Cotterell v. Purchase*, Cas. t. Talbot, 63, *per* Lord Talbot ; *Medlicott v. O'Donel*, 1 B. & B. 166, *per* Lord Manners ; *Arran v. Tyrawly*, cited 1b. 170 ; *Alden v. Gregory*, 2 Ed. 280 ; *Morse v. Royal*, 12 Ves. 374, *per* Lord Erskine ; *Bicknell v. Gough*, 3 Atk. 558 ; *South Sea Company v. Wymondsell*, 3 P. W. 143 ; *Booth v. Warrington*, 4 B. P. C. 163 ; *Pickering v. Lord Stamford*, 2 Ves. jun. 280, *per* Lord Alvanley ; Sel. Cas. Ch. 34 ; see *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 634 ; *Roche v. O'Brien*, 1 B. & B. 330 ; *Blennerhassett v. Day*, 2 B. & B. 118, *per* Lord Manners ; *Whitton v. Toone*, 5 Mad. 54 ; and see *Whal-*

ley v. Whalley, 1 Mer. 436 ; *Western v. Cartwright*, Sel. Cas. ch. 34.

But Sir A. Hart thought time would run against fraud from the date of it, though undiscovered, provided the person entitled had knowledge of the fraud a reasonable time before the expiration of the period. *Byrne v. Frere*, 2 Moll. 137.

(*s*) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 634, *per* Lord Redesdale ; *Western v. Cartwright*, Sel. Ch. Ca. 34.

(*t*) *Foster v. Hodgson*, 19 Ves. 180 ; *Beckford v. Close*, cited 1b. 184 ; *Hardy v. Reeves*, 4 Ves. 479, *per* Lord Alvanley ; *Hodley v. Healey*, 1 V. & B. 539 ; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 637-8 ; *Jenner v. Tracy*, cited *Cook v.*

appear on the bill, by plea (*u*); or the defendant may pray in his answer to have the same benefit at the hearing as if he had pleaded the statute (*x*); but, if he neither demur, nor plead, nor pray to have the same benefit as if he had pleaded, he cannot shelter himself under the statute at the time of the hearing (*y*); though the Court itself may still, in its own discretion, refuse to grant relief after the limited period (*z*).

Even when the bill charges *fraud* the defendant may demur (*a*), or plead (*b*), unless the plaintiff allege that the fraud was only discovered within the period limited by the statute. But if the plaintiff do so allege, the defendant must then by plea either deny the fraud, or prove that the plaintiff had knowledge of it (*c*).

2. The Court, after great length of time, will *presume* some act to have been done, which, if done, is a bar to the demand.

The period at which the Court raises the presumption depends upon the circumstances of the case. As a

Arnhem, 3 P. W. 287, note (B); *Windsor*, 2 Ves. 483, *per* Lord Pearson *v. Pulley*, 1 Ch. Ca. 102; Hardwicke; *Prince v. Heylin*, 1 *Frazer v. Moor*, Bunb. 54. But Atk. 494, *per eundem*; and see *Deloraine v. Brown*, 3 B.C.C. 633, *Attorney-General v. Christ's Hospital*, 3 M. & K. 344. and Lord Hardwicke in *Aggas v. Pickerell*, 3 Atk. 225, *contra*.

(*u*) *Aggas v. Pickerell*, 3 Atk. 225, and the cases there cited; *Wych v. E. I. Company*, 3 P. W. 309; *Lacon v. Lacon*, 2 Atk. 395; *Welford v. Liddel*, 2 Ves. 400; *Blewitt v. Thomas*, 2 Ves. jun. 669; &c.

(*x*) *Barber v. Barber*, 18 Ves. 286; &c.

(*y*) *Earl of Pomfret v. Lord*

(*z*) *Prince v. Heylin*, *ubi supra*.

(*a*) See *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 637, disapproving *Lord Deloraine v. Browne*, 3 B. C. C. 633; *Hoare v. Peck*, 6 Sim. 51.

(*b*) *South Sea Company v. Wymondsell*, 3 P. W. 143.

(*c*) See Mitford on Pleading, 269, 4th ed.

general rule, the Court presumes, after a lapse of twenty years (1), but where there is a statutable bar at law, and of a different period, the Court will not entertain a presumption within a less time than the period fixed by the statute. Thus, in a case at law, where an action was brought for the recovery of a quit-rent, no demand of payment having been made for the preceding thirty-seven years, Baron Eyre was of opinion, that, although the claim was not barred by the statute, yet after non-payment and acquiescence of that length of time a release might be presumed, and directed the jury to find the quit-rent extinguished. A new trial was granted, and Lord Mansfield said, "there was no instance of setting up any length of time short of the period fixed by the statute as a bar to the demand, and in cases of quit-rents like the present the reason of carrying back the limitation to the period fixed by the statute, viz. fifty years, was the stronger, because the consideration was so trifling, though, if a real ground for supposing a release or extinguishment appeared, the smallness of the claim would have no weight; but in this case there was mere length of time, which, barely as such, ought not to be received as a bar (d)."

Presumptions are made, not because the Court really believes what is presumed, but, in the absence of all

(d) *Eldridge v. Knott*, Cowp. 214.

(1) In *Harmood v. Oglander*, 6 Ves. 199, 8 Ves. 106, the bill was filed after a lapse of *thirty-two years*, yet neither Lord Alvanley nor Lord Eldon considered the length of time to bar the plaintiff's demand; but in this case the parties were *equitable tenants in common*, and as between them the presumption of *ouster* does not arise, or not in an equal degree.

evidence, for the purpose and from a principle of quieting the possession (*e*). Lord Erskine observed, "It is said you cannot presume unless you believe. It is because there are no means of creating belief or disbelief, that such general presumptions are raised: upon the weakness and infirmity of all human tribunals in judging of matters of antiquity, instead of belief which must be the foundation of this judgment upon a recent transaction, where the circumstances are incapable of forming any thing like belief the legal presumption holds the place of particular and individual belief (*f*)."¹ Where *positive* evidence can be presented to the Court, the fact may be presumed after a period much shorter than the usual one. And, on the other hand, though the distance of time may be far greater than the ordinary limit for presumption, yet if there appear any positive evidence to negative the fact, the legal inference cannot be sustained, for the rule is *stabit presumptio donec probetur in contrarium*. But the Court has judged it better for the ends of justice, that presumptions should be *favoured* in law, and should not be rebutted by very slight evidence in contradiction (*g*).

The Court cannot *presume* a person to have abandoned his right so long as he remains in *ignorance* of it, or labours under a *mistake* (*h*); and the *distress* of a

(*e*) *Eldridge v. Knott*, Cowp. 215, *per* Lord Mansfield.

(*f*) *Hillary v. Waller*, 12 Ves. 266.

(*g*) *Jones v. Turberville*, 2 Ves. jun., 13, *per* Lord Commissioner Eyre.

(*h*) See *Marquis of Cholmondeley v. Lord Clinton*, 2 Mer. 362;

Randall v. Errington, 10 Ves. 427; *Roche v. O'Brien*, 1 B. & B.

330, *see* 342; *Pickering v. Stamford*, 2 Ves. jun. 280, and following pages; *S.C.* Ib. 585; *Chalmer v. Bradley*, 1 J. & W. 65, and following pages; *Bennett v. Colley*, 2 M. & K. 232.

person, so far as it accounts for his *laches*, will *pro tanto* weaken the foundation of the presumption (i). So a release of right cannot with the same force be presumed against a class of persons, as against an individual; for it is not likely that a person having only an aliquot share in the property should pursue his remedy with the same spirit, as if he were the exclusive proprietor (k).

Under the head of presumption we may notice the subject of *waiver*, for it would seem that *waiver* is not a bar *per se*, but operates by way of furnishing evidence towards establishing the presumption. "As to *waiver*," said Sir W. Grant, "it is difficult to say precisely what is meant by that term. With reference to the legal effect, a *waiver* is nothing, unless it amount to a release. It is by a release, or something equivalent only, that an equitable demand can be given away. A mere *waiver* signifies nothing more than an expression of intention not to insist upon the right, which in *equity* will not without consideration bar the right any more than at *law* an accord without satisfaction would be a plea. If there be a consideration, however slight, I do not know that the Court would not consider it a sufficient foundation for a release, or what is equivalent to a release (l)."

A bar by analogy to a statute may, as we have seen, be taken advantage of by demurrer, or plea, or answer;

(i) See *Roche v. O'Brien*, 1 B. Ves. 158; *Hardwick v. Mynd*, & B. 342; *Hillary v. Waller*, 12 1 Anst. 109; *Attorney-General v. Ves. 266*; *Gowland v. De Faria*, Lord Dudley, Coop. 146; but see 17 Ves. 25; *Byrne v. Frere*, 2 *Elliot v. Merriman*, 2 Atk. 42; Moll. 171, 178. *Hercy v. Dinwoody*, 2 Ves. jun.

(k) See *Whichcote v. Lawrence*, 3 Ves. 752; *Anon. case*, cited *Lister v. Lister*, 6 Ves. 632; *Kidney v. Coussmaker*, 12 87. (l) *Stuckhouse v. Barnston*, 10 Ves. 466.

but a presumption, being the inference of a fact, cannot be opposed to a claim by way of demurrer.

Thus, in *Deloraine v. Brown* (*m*) the defendant put in for general demurrer, that it appeared by the bill the last transaction sought to be impeached thereby happened twenty-eight years before the filing of the bill, and the plaintiff had shewn no cause why he had not sooner instituted the suit. "The argument," said Lord Thurlow, "must be, not that a positive limitation of time has barred the suit, for that would be a pure question of law ; but that, from long acquiescence, it should be presumed that the frauds charged did not exist, or that it should be intended that the plaintiff had confirmed the transaction, or had released, or submitted upon such consideration as to bar himself from the general equity stated in the bill. This must be an inference of fact, and not an inference of law ; and the demurrer must be overruled, because the defendant has no right to avail himself by demurrer of an inference of fact upon matter, on which a jury in a Court of law would collect matter of fact to decide their verdict if submitted to them, or a Court would proceed in the same manner in equity. What limitation of time will bar a suit where there is no positive limitation, or under what circumstances the lapse of time ought to have that effect, must depend on the facts of the particular case, and the conclusion must be an inference of fact, and not an inference of law, and therefore cannot be made on demurrer (*n*) (1)."

(*m*) 3 B. C. C. 633.

Mitford on Pleading, 212, 4th ed.

(*n*) See the argument stated in

(1) Lord Thurlow considered the demurrer in this case to turn on presumption, and, on that supposition, it was rightly overruled ; but Lord

3. Though the plaintiff's demand cannot be met by an absolute bar, and no release of right can be presumed; yet, thirdly, relief will not be granted where, if administered, it would lead to great public or private inconvenience (*o*).

Thus in a bill for an account against an executor or administrator, who is in equity a trustee, and not reached by any statute of limitation, though the *presumption* of a final settlement may be rebutted by positive evidence, the Court will not open the account at any distance of time, when it is probable most of the parties are dead, and the vouchers and receipts are lost (*p*).

Where a suit was prosecuted after a delay of three-score and two years, Lord Keeper Wright said, that "the cause being now within one year of the grand climacteric, it was fit it should be at rest (*q*).” But bills have been dismissed at the end of twenty-seven years (*r*), and a much shorter period would be a sufficient bar, should the Court see a difficulty in granting the relief: every case must be determined with reference to its own particular circumstances (*s*).

(*o*) See *Attorney - General v. Mayor of Exeter*, Jac. 448.

(*q*) *St. John v. Turner*, 2 Vern. 418.

(*p*) *Hunton v. Davies*, 2 Ch. Re. 44; *Huet v. Fletcher*, 1 Atk. 467; *Pearson v. Belchier*, 4 Ves.

(*r*) *Campbell v. Graham*, 1 R. & M. 453.

627; *Hercy v. Dinwoody*, 2 Ves. jun. 87.

(*s*) See *Hercy v. Dinwoody*, 2 Ves. jun. 93; *Earl of Pomfret v. Lord Windsor*, 2 Ves. 483.

Redesdale, whose profound knowledge of equity pleading cannot be disputed, has since declared his opinion that the defendant's demurrer was good, as stating not matter of fact, but what is matter of law, viz., the bar to the plaintiff's demand by analogy, or in obedience to the Statute of Limitations. *Hovenden v. Lord Amessley*, 2 Sch. & Lef. 637.

Where there is no bar by analogy to a statute, nor any ground for presumption of a release, nor any private or public inconvenience, there is then no obstacle to the claim from the mere lapse of time (*t*).

Thus in *Pickering v. Lord Stamford* (*u*) a testator gave the residue of his personal estate to a charity, and thirty-five years after his decease the next of kin filed their bill for an account, and prayed that such part as consisted of money upon mortgage, or other real securities, might be declared a void bequest, and distributable, subject to debts, &c., among the testator's next of kin. Lord Alvanley said, "I should be happy to dismiss the bill, if I were authorized by law to say this Court would not entertain one after twenty years, every disability to sue being removed. I heartily wish it was so, and see no reason why it should not. It is a grievous thing that the defendants should be disturbed after so long a lapse. At the same time I know no rule that has established that mere length of time will bar. Therefore, that being the case, I am to say whether under the circumstances a bar can be presumed (*x*)."

And for facilitating the question of presumption, his Lordship directed certain previous inquiries by the Master; and it appearing from the report, that no release or assignment of their interest by the next of kin for the purposes of the charity could under the circumstances be presumed, his Lordship then had recourse to the ground of inconvenience. "It does not follow," he said, "that the bill may not be dismissed, though it cannot be pleaded to. The question in all these cases is, whether there are motives of public policy, or

(*t*) *Earl of Pomfret v. Lord* Jac. 443.

Windsor, 2 Ves. 472: see *Attor-* (*u*) 2 Ves. jun. 272.

ney-General v. Mayor of Exeter, (*x*) *Ib.* 283.

private inconvenience, to induce the Court to say, under all the circumstances, the suit ought not to be entertained; and if great public inconvenience would arise, and the stale demand would involve the parties in endless difficulties in clearing the accounts—difficulties arising from the negligence of the other parties in lying by, I very much concur with the principle Lord Cowper lays down in *Pooley v. Ray* (y), that a person, who willingly stands by while the executor pays away money, shall not oblige him to refund, for this would be drawing the executor into a snare. If from the plaintiff's lying by it is impossible for the defendants to render the accounts he calls for, or it will subject them to great inconvenience, he must suffer; or the Court will oppose, what I think the best ground, *public convenience*. It might have happened, that the trustees, taking possession of the personal estate, and not aware of the law, might in the course of so many years have conducted themselves so as not to be able to prove of what the personal estate consisted at the death of the testator. They might have kept such accounts, that it would have been impossible to determine whether the plaintiffs could have made any specific demand upon any part of the personal estate. If so, I should have dismissed the bill. If the executors had lost the accounts I should not have punished them; for executors are not bound to keep accounts for thirty years. The plaintiffs are so conscious of this, that they do not call on the trustees to account for what has been disbursed before any demand made; and therefore it is insisted no such inconvenience will arise, as they only desire such an account as can be given, and are willing to take that part of the personal estate, that appears to have

(y) 1 P. W. 355.

consisted of real securities, and demand no account of interest farther than from the time of filing the bill. It appears that the trustees, who by their conduct have done themselves great credit, have kept such accounts, that there is no difficulty in finding the personal estate at the death of the testator. Then, the only inconvenience will be, that the charity will now cease to have so much. That is certainly to be lamented, but it will not involve any person in difficulties to be attributed to the neglect of the plaintiffs. Therefore, desiring to be understood by no means to give any countenance to these stale demands, but upon the circumstances, that there is nothing inducing great public or private inconvenience, that the accounts are found, and that the trustees are not called on to account for what has been disbursed, I am bound to decide in favour of the plaintiffs (x)."

We may now introduce the late Act for the limitation of actions and suits (a).

By the 24th section it is declared, that "no person claiming any *land* or *rent* in *equity* shall bring any suit to recover the same but within the period, during which by virtue of the provisions thereinbefore contained he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at *law* to such estate, interest, or right in or to the same as he shall claim therein in equity."

This enactment, it must be observed, applies to *lands* and *rents* only as defined by the first section, and in respect of such property it is merely confirmatory of what was before settled in equity upon general principles. The *legal* bar was already an *equitable* bar by analogy to the

(x) 2 Ves. jun. 582, and following pages.

(a) 3 & 4 W. 4, c. 27.

the statute, and the present Act has made it an express bar.

The 25th section declares, that, "when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of the Act, *at and not before the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration*, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him."

Therefore, if, as in *The Marquis of Cholmondeley v. Lord Clinton* (b), lands be vested in A. and his heirs upon trust for B. and his heirs, and on B.'s death C., by mistake, is considered as the rightful owner, and enters on possession, and deals with the property by voluntary settlement or devise, but makes no conveyance to a *bonâ fide* purchaser, the heir of B. is not barred of his remedy by virtue of this Act, though 20 years may have elapsed. But in such a case, though the positive bar by virtue of the Act does not apply, yet a bar to the suit may still be pleaded on the principles laid down before the Act, by analogy to the statute of James.

The 26th section declares, that "in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such

(b) 2 J. & W. 1.

fraud shall, or with reasonable diligence might have been, first known or discovered."

This enactment also is not introductory of any new law, but is merely confirmatory of the doctrines, which equity, acting on general principles, had previously established.

By the 27th section it is provided, that " nothing in the Act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit might not be barred by virtue of that Act."

2. We shall briefly notice to what extent a court of equity, upon recovery of the estate, will direct an account against the defendant of the *mesne rents and profits*.

The general rule is, that a *cestui que trust*, by establishing his claim to the land, has shown inclusively a right to the *mesne rents and profits* from the very commencement of his title, for, if the *corpus* of the estate was his, the rents and profits, which ought to follow the *corpus*, were tortiously intercepted by the wrongful possessor (*c*).

But to this rule several exceptions must be made, for,

1. It would seem the *cestui que trust* cannot enforce an account beyond the period of the preceding six years; provided, at least, the defendant has pleaded the Statute of Limitations in bar (*d*).

(*c*) *Dormer v. Fortescue*, Ridg. 269; *Reade v. Reade*, 5 Ves. 749, Rep. t. Hardwicke, 183, S. C. 750; *Harmood v. Oglander*, 6 Ves. 3 Atk. 130, per Lord Hardwicke; 215; *Drummond v. Duke of St. Hobson v. Trevor*, 2 P. W. 191; *Albans*, 5 Ves. 439; *Hercy v. Coventry v. Hall*, 2 Ch. Ca. 134; *Ballard*, 4 B. C. C. 468; *Stackhouse v. Barnston*, 10 Ves. 470; *Attorney-General v. Floyer*, 2 Vern. 748; *Duke of Norfolk's case*, 3 Ch. Ca. 52. *Monypenny v. Bristow*, 2 R. & M. 125.

(*d*) *Love v. Eade*, Rep. t. Finch,

2. If the defendant was a *bond fide* possessor, that is, if he had no notice of the plaintiff's title expressly given him, and had no deeds or writings in his custody which shewed the title of the plaintiff or any stranger, in such case the account of the *mesne* rents and profits will be restricted to the time of filing the bill (*e*); and no farther account will be granted, though the plaintiff was an infant, and the defendant an express trustee, but ignorant of his own true character (*f*). However, such rents and profits as accrued before the filing of the bill, but never came to the hands of the defendant, as money paid into Court, will follow the right to the land, and be decreed to the plaintiff (*g*).

3. If the *cestui que trust* be guilty of *laches*, the account will not be carried farther back than to the filing of the bill, for it was the plaintiff's own fault that he did not institute his suit at an earlier period (*h*); and if it be a case of *great laches*, the Court will shew its displeasure by not directing an account beyond the date of the decree (*i*).

In an old case a *cestui que trust* had filed his bill for an estate upon the ground of an equitable title, and charged the defendant with the receipt of the *mesne* rents and

(*e*) *Dormer v. Fortescue*, Ridg. Rep. t. Hardwicke, 183, S. C. 3 Atk. 134, per Lord Hardwicke; *Pulleney v. Warren*, 6 Ves. 93, per Lord Eldon; *Edwards v. Morgan*, M'Clel. 541, see 554, 555; *Forder v. Wade*, 4 B. C. C. 521.

(*f*) *Drummond v. Duke of St. Albans*, 5 Ves. 433, see 439.

(*g*) *S. C.*

(*h*) *Dormer v. Fortescue*, Ridg.

Rep. t. Hardwicke, 183, S. C. 3 Atk. 130, per Lord Hardwicke; *Cook v. Arnam*, 2 Eq. Ca. Ab. 235; *Pettward v. Prescott*, 7 Ves. 541; *Bowes v. East London Waterworks Company*, 3 Mad. 375; and see *Pickett v. Loggon*, 14 Ves. 215; *Kidney v. Cousmaker*, 12 Ves. 158.

(*i*) *Acherley v. Roe*, 5 Ves. 565.

profits, but prayed only for a conveyance of the lands, omitting to pray specially for any account of the rents. A conveyance was decreed, and no account ordered; but afterwards the *cestui que trust* filed a second bill for the exclusive purpose of obtaining an account of the *mesne* rents and profits, and the Court so decreed it (*k*) (1).

(*k*) *Hall v. Coventry*, 2 Ch. Ca. 134.

(1) As the subject of accounting for *mesne* rents and profits in equity is nowhere to be found in any systematic form, the following remarks may perhaps not be found useless.

An account of rents and profits may be sought, either independently of relief respecting the *corpus* of the land, or as incident or collateral to it.

I. Where the account is sought independently of other relief, if it be directed against a person who is an *express trustee*, then, as the statutes of limitation do not run between trustee and *cestui que trust*, an account will be directed from the time the rents were withdrawn. See *Attorney-General v. Brewers' Company*, 1 Mer. 498.

If the claim to the rents rest upon a *legal* title, the plaintiff has then a *legal* remedy, and cannot come into a court of equity at all; *Jesus College v. Bloome*, 3 Atk. 262; and see *Dinwiddie v. Bailey*, 6 Ves. 136; *Taylor v. Crompton*, Bunb. 95; *Lansdowne v. Lansdowne*, 1 Mad. 137; except in cases where, from the complicated nature of the accounts, or other particular circumstances, a court of law would afford very inadequate relief: see *O'Connor v. Spaight*, 1 Sch. & Lef. 309; *Corporation of Carlisle v. Wilson*, 13 Ves. 276. But an *infant* may file a bill for an account upon a legal title; *Gardiner v. Fell*, 1 J. & W. 22; *Roberdeau v. Rous*, 1 Atk. 543; *Yallop v. Holworthy*, 1 Eq. Ca. Ab. 7; *Newburgh v. Bickerstaffe*, 1 Vern. 295; as every person entering upon an *infant's* lands is regarded in the light of a bailiff or receiver for the *infant*; *Dormer v. Fortescue*, 3 Atk. 130, *per* Lord Hardwicke; *Pulteney v. Warren*, 6 Ves. 89, *per* Lord Eldon; *Newburgh v. Bickerstaffe*, 1 Vern. 296, *per* Lord Keeper North; and generally all persons may have an account upon a legal title in respect of *mines*, which are a species of trade; *Bishop of Winchester v. Knight*, 1 P. W. 406; and see *Pulteney v. Warren*, 6 Ves. 89; *Lansdowne v. Lansdowne*, 1 Mad. 116; or of *tithes*, which when severed are property in trust; *Collins v. Archer*, 1 R. & M. 284; &c.; but not it seems of *timber*, without praying an injunction, *Jesus College v. Bloom*, 3 Atk.

II. Of the remedy against the trustee personally by way of compensation.

262; and see *Pulteney v. Warren*, 6 Ves. 89; *University of Oxford v. Richardson*, Ib. 701; *Grierson v. Eyre*, 9 Ves. 346; but see *Garth v. Cotton*, 1 Dick. 211; *Lee v. Alston*, 1 B. C. C. 194.

Although where a remedy lies at law an account cannot be had in equity against the *pernor* of the profits himself, yet, perhaps, after his decease, if the action survive at law against the executor, the party entitled to the profits may consider himself a creditor, and file a bill in equity for an account of the assets. *Monypenny v. Bristow*, 2 R. & M. 117 (but the bill also prayed delivery of title deeds); *Gardiner v. Fell*, 1 J. & W. 22 (but the plaintiff was also an infant).

Where, as in the preceding cases, a court of equity assumes a concurrent jurisdiction with courts of law, the account will not be extended beyond the legal limit of six years, provided the statute be pleaded, *Lockey v. Lockey*, Pr. Ch. 518; but if the defendant do not avail himself of the statute by demurrer, plea, or answer, the account will be granted in equity, as at law, from the time the title accrued. See *Monypenny v. Bristow*, 2 R. & M. 125.

It often happens that a legal remedy *did* exist, but has since, by the death of a party, or the determination of the estate, become extinguished. In such a case, as the right *was not*, but only *is*, without a remedy at law, there seems no ground in general for the interference of a court of equity. *Barnwall v. Barnwall*, 3 Ridg. P. C. 71, *per* Lord Fitzgibbon; *Hutton v. Simpson*, 2 Vern. 722; *Norton v. Frecker*, 1 Atk. 525-6, *per* Lord Hardwicke; and see *Pulteney v. Warren*, 6 Ves. 88.

But if the remedy was lost through *mistake*, the Court upon that principle will interpose: as where a lease was held for the lives of A. and his two daughters B. and C., and A. afterwards married again, and had another daughter, who was also named B., and the landlord on the expiration of the lease by the death of the real *cestuis que vie* did not enter, B. the daughter by the second marriage being mistaken for B. the life named in the lease, Lord Macclesfield said, "Where one has title of entry, and neglects to enter or to bring his ejectment, but sleeps upon it for several years, *as he has no remedy at law for the mesne profits, so neither has he in equity*, for it was his own fault he did not enter, and he shall never come into a court of equity for relief against his own negligence, or to make the tenant in possession who held over his lease to be but his bailiff or steward, whether he will or not; but in the present case, *by reason of the circumstance of both daughters being of the same name,*

In the event of a breach of duty by the trustee, the *cestui que trust* is entitled to file a bill against the trustee,

and the mistake consequent thereon, the defendant must account for the *mesne* profits from the expiration of the lease." *Duke of Bolton v. Deane*, Pr. Ch. 516. (Note, in this case Lord Hardwicke thought a remedy still existed at law, *Dormer v. Fortescue*, Ridg. Rep. i. Hardwicke; but Lord Macclesfield was evidently of a different opinion, and so was Lord Fitzgibbon. *Barnwall v. Barnwall*, 3 Ridg. P. C. 68.)

So equity will relieve where the remedy was prevented by *fraud*: as where A. was entitled to a leasehold estate, but B., concealing the deeds, remained in possession until the term had expired, Lord King directed an account of the rents and profits from the time that A.'s title accrued, on the ground that A. had been kept in ignorance of his just rights through B.'s fraudulent concealment of the deed and counterpart. *Bennet v. Whitehead*, 2 P. W. 644; and see *Duke of Bolton v. Deane*, *ubi supra*, and *Barnwall v. Barnwall*, 3 Ridg. P. C. 66.

And generally the Court will in all cases lend its aid where the legal process has been lost, not by any delay on the part of the plaintiff, but through some default of the defendant. *Pulteney v. Warren*, 6 Ves. 73.

And an *infant* will of course be entitled to an account upon the ground that the pernor of the profits is a bailiff or receiver for the infant. *Duke of Bolton v. Deane*, Pr. Ch. 517, *per* Lord Macclesfield; *Hutton v. Simpson*, 2 Vern. 724; *Tilly v. Bridges*, Pr. Ch. 252.

II. An account may be sought as incident or collateral to the relief. The doctrines upon this subject have been very distinctly laid down by Lord Fitzgibbon in *Barnwall v. Barnwall*, 3 Ridg. P. C. 66.

1. "The general rule of equity," he said, "is, that if the suit for recovery of possession be properly cognizable in a court of equity, and the plaintiff obtain a decree, the Court will direct an account of rents and profits, as incident to such relief."

This rule has been treated of in the text, and requires no further observation.

2. "If a man have a mere legal title to the possession, he has no right to come into equity for the recovery of it; and if he has originally recovered the possession at law, he has no manner of right to proceed by bill for an account of rents and profits: as his title to the possession was at law, he must proceed for the whole there." See also *Dormer v. Fortescue*, 3 Atk. 130; *Tilly v. Bridges*, Pr. Ch. 252; *Owen v.*

if living, or, if dead, against his representative, to enforce a compensation for the loss the trust estate has sus-

Apreece, 1 Ch. Re. 32; *Aspin. case*, 1 Vern. 105, contradicted 3 Atk. 129.

Upon this rule it must be remarked, that a *dowress*, *Mundy v. Mundy*, 2 Ves. Jun. 122; *D'Arcy v. Blake*, 2 Sch. & Lef. 537; *Wild v. Wells*, 1 Dick. 3; *Meggot v. Meggot*, 2 Id. 794; *Goodenough v. Goodenough*, 2 Id. 795; *Curtis v. Curtis*, 2 B. C. C. 620; *Maor v. Black*, Rep. J. Talbot, 126; and see *Dormer v. Fortescue*, 3 Atk. 130; *Pulteney v. Warren*, 6 Ves. 89; *Agar v. Fairfax*, 17 Ves. 552; and *infant*, see *Dormer v. Fortescue*, 3 Atk. 130, 184; *S. C. Ridg. Rep. t. Hardwicke*, 183, 191; *Pulteney v. Warren*, 6 Ves. 89; *Newburgh v. Bickerstaffe*, 1 Vern. 295, are allowed, on the principles before mentioned, to proceed in equity upon their legal title, and incidentally to the relief will be decreed an account of the *mesne* rents and profits. But by 3 & 4 W. 4. c. 27, s. 41, the arrears of dower are recoverable for six years only next preceding the commencement of the suit. And the account of an *infant* will be barred, if he do not bring his bill within six years after he has attained his majority. *Lockey v. Lockey*, Pr. Ch. 518.

3. "If a party be obliged to come into a court of equity for aid to enable him to prosecute his title at law" (as where he cannot recover in a legal action by reason of an outstanding term, or because the title deeds to the estate are in the hands of the defendant), "after possession recovered at law, there may be cases in which he may come back for an account of rents and profits in the suit depending in equity." And see *Dormer v. Fortescue*, 3 Atk. 124; *S. C. Ridg. Rep. t. Hardwicke*, 176; *Reade v. Reade*, 5 Ves. 744. Or the plaintiff, being obliged to resort to equity on one ground, may, to prevent circuitry, ask complete relief in the first instance in that court; and if his title be established, either by the determination of the Court itself, or by an issue directed at law, an account of the rents and profits will be consequential upon the relief. *Townsend v. Ash*, 3 Atk. 336; *Edwards v. Morgan*, M'Clel. 541; *Reynolds v. Jones*, 2 Sim. & Stu. 206.

In these cases the account will clearly be restricted to the period of six years; for the plaintiff recovers upon a *legal* title, and the circumstance of his being obliged to sue in equity does not alter the nature of the action for *mesne* rents and profits. See *Reade v. Reade*, 5 Ves. 749, 750; *Harwood v. Oglander*, 6 Ves. 215; *Drummond v. Duke of St. Albans*, 5 Ves. 439; *Hercy v. Ballard*, 4 B. C. C. 468; *Stackhouse v. Barnston*,

tained (1). But the claim of the *cestui que trust* is a simple contract debt only, and therefore, until the late act, it was payable, not out of the real, but only out of the personal assets (1).

If the trustee become bankrupt or insolvent, the *cestui que trust* may prove for his loss against the estate of the bankrupt or insolvent (m); and if interest would have been decreed in equity against the trustee himself, it will constitute part of the debt in the proof against the estate in the hands of the assignees (n); and if the breach of trust was a sale of stock and misemployment of the money, the *cestui que trust* may, at his option, prove either for the proceeds of the sale, or for the price of the stock at the date of the commission (o).

(1) See *supra*, p. 228.

Motly, 2 M. & K. 312.

(m) *Keble v. Thompson*, 3 B.C.C. 112; *Moons v. De Bernales*, 1 Russ. 301; *Dornford v. Dornford*, 12 Ves. 127; *ex parte Shakeshaft*, 3 B. C. C. 197; *Bick v.*

(n) *Dornford v. Dornford*, *Bick v. Motly*, *Moons v. De Bernales*, *ubi supra*.

(o) *Ex parte Shakeshaft*, 3 B. C. C. 197.

10 Ves. 470; *Monypenny v. Bristow*, 2 R. & M. 125; and see *Reynolds v. Jones*, 2 Sim. & Stu. 206.

But if the plaintiff has been kept out of the estate by the *fraud, misrepresentation, or concealment* of the defendant, the Court will suppose that, had the plaintiff known his just rights, he would have commenced his action at law on the first accruer of his title, and will then decree an account of the *mesne* rents and profits against the defendant from that period. *Dormer v. Fortescue*, Ridg. Rep. t. Hardwicke, 184, 185; *S. C.* 3 Atk. 130.

On the other hand, if the plaintiff be in fault, as, if he be guilty of *laches*, the account will be restricted to the time of filing the bill. *Edwards v. Morgan*, M'Clel. 541, see 557.

(1) The right against the representative was very early established, for Sir T. Egerton, in ruling to that effect in the reign of Elizabeth, said, he had seen a similar case resolved by all the judges of England in the thirty-fourth year of H. 6. *Mears's case*, 4 Inst. 86.

In awarding compensation against the trustee, the Court pays no regard to the circumstance whether the trustee derived any actual advantage or not, but proceeds upon the principle, that a trustee, who deviates from the line of his duty, is under an obligation to make good the situation of the *cestui que trust* (*p*); and if a trustee be guilty of misconduct, and a loss follow, it does not acquit him, because, as subsequent events have shewn, the loss would equally have been incurred had the breach of trust never been committed: if the damage happen by fire, lightning, or any other accident, it will be no excuse to the trustee, if guilty of previous negligence (*q*).

But a trustee will not be charged with *imaginary values* (*r*); and, being regarded as a mere stakeholder, he will not be liable for more than he has actually received (*s*), except in cases of very supine negligence, or wilful default (*t*).

Where *co-trustees* are *jointly* implicated in a breach of trust, it seems the *cestui que trust* may at his option proceed against any one of them singly, or against all of them collectively (*u*), for as regards the remedy of the *cestui*

(*p*) See *Dornford v. Dornford*, 12 Ves. 129; *Raphael v. Boehm*, 13 Ves. 411; *S. C.* Ib. 490, 491; *Moons v. De Bernales*, 1 Russ. 305; *Adair v. Shaw*, 1 Sch. & Lef. 272; *Lord Montfort v. Lord Cadogan*, 17 Ves. 489; *Scurfield v. Howes*, 3 B. C. C. 90; but see *Attorney-General v. Greenhouse*, 1 B. N. R. 57—9.

(*q*) See *Caffrey v. Darby*, 6 Ves. 496; *Cocker v. Quayle*, 1 R. & M. 535.

(*r*) *Palmer v. Jones*, 1 Vern. 144.

(*s*) *Harnard v. Webster*, Sel. Ch. Ca. 53.

(*t*) *Pybus v. Smith*, 1 Ves. jun. 193, *per* Lord Thurlow; *Palmer v. Jones*, *ubi supra*, *per* Lord Nottingham.

(*u*) *Ex parte Shakeshaft*, 3 B. C. C. 197; *Walker v. Symonds*, 3 Sw. 74, 75; and see *ex parte Angle*, Barn. 425; but see *in re Chertsey Market*, 6 Price, 278, 279; *Taylor v. Tabrum*, 6 Sim. 281.

que trust there is no *primary* liability, but each trustee is responsible for the entirety of the loss incurred (*x*). But where a trustee had refused to accept the office unless another should be named with him, and the trust money be divided between them, so that each might be responsible for a moiety only, and this was accordingly done, but the trust deed was drawn in the usual form as if they were joint trustees of the whole sum, it was held, upon the insolvency of one of the trustees, that the co-trustee should not be answerable for more than the moiety paid to himself, the division of the trust money being, Sir J. Leach observed, "a term in the creation of the trust (*y*)."
But though, as respects the remedy of the *cestui que trust*, each trustee is individually responsible for the whole amount of the loss, whether he was the principal in the breach of trust, or was merely a consenting party, yet, as between the trustees (*z*), or as between the trustees and a third person who has reaped the benefit of the breach of trust (*a*), the Court will fix the *onus* upon the person who in reality was the contriver of, or gainer by, the fraud.

Thus, in *Trafford v. Boehm* (*b*), Henry Heathcote and Charles Boehm were the trustees of Mr. Trafford's marriage settlement, and the fortune of the lady was placed in their hands, to be laid out in a purchase of lands, as soon as one could conveniently be found. No suitable purchase offering, the money was invested *by the direction of*

(*x*) See *Wilson v. Moore*, 1 M. 440; *Lord Montfort v. Lord Cadogan*, 17 Ves. 485; 19 Ves. & K. 146.

(*y*) *Birls v. Betty*, 6 Mad. 90. 635; *S. C.* 2 Mer. 3; and see

(*z*) *Ex parte Shakeshaft*, 3 B. *Howe v. Earl of Montfort*, 7 Ves. C. C. 198, *per* Lord Thurlow. 150, 151.

(*a*) *Trafford v. Boehm*, 3 Atk. (b) *Ubi supra*.

the husband in South Sea Stock, and a loss was incurred. Lord Hardwicke said, "There is no doubt this Court will endeavour to deliver a trustee from any mischief that may happen from a misapplication of trust money, and in the present instance the loss must first come out of the estate of the husband, because done with his concurrence or subsequent assent, for he has passed the account with the trustees, and constantly received the dividends of the stock. The rule of the Court is, that if a trustee err in the management of the trust with the approbation of the cestui que trust, it must be made good first out of the estate of the person who consented to it."

And the same principle was acted upon in the case of *Lord Montfort v. Lord Cadogan* (c). By indenture bearing date in 1772, certain leaseholds were vested in trustees upon trust *in the first place to renew the leases out of the rents and profits*, and then upon trust for Lord Montfort for life, remainder to Lady Montfort for life, remainder to the issue. The first period of renewal occurred in 1786, and the second in 1800, and Lord Montfort died in 1799. The trustees, instead of renewing, as they should have done, permitted Lord Montfort during his life, and Lady Montfort after his decease, to receive the *whole* rents of the estate. Lord Montfort, the son and only issue, renewed the lease at his own expense in 1808, during the lifetime of the dowager Lady Montfort, and then filed a bill against her, the executors of Lord Montfort his father, and the trustees, to be repaid the money he had advanced for the renewal. Sir W. Grant said, "Though my opinion is that these trustees are answerable, they

are not alone answerable. The tenants for life have acquiesced in the breach of trust, and profited by it by receiving the *whole* rents and profits, a *part* of which was applicable to the renewals. *All these parties are answerable to the plaintiff; but as between the tenants for life and the trustees, if Lord Montfort has left assets, they will in the first place be applicable to make good so much of the fine as corresponds with the period of his enjoyment.* Lady Montfort is in like manner answerable for the period of her possession, and the accruing rents during her life are liable to be impounded to make good the demand against her. Whatever can be got from these funds will go in ease of the trustees." And the decree was, that the renewal fine ought to be paid to the plaintiff by the trustees, but that the same ought to be repaid to them out of the estates of Lord Montfort deceased, and of the dowager Lady Montfort, *according to the times they had respectively been in possession.* From this decree some of the parties appealed (*d*), and Lord Eldon, before whom the case was now argued, said, "One question is, whether Lord Montfort's estate, if sufficient, and that of Lady Montfort, should have been resorted to for payment of the plaintiff's demand before the trustees were called upon, and many cases have established, that *a tenant for life joining in a breach of trust shall be answerable in the first instance*; but the *cestui que trust* is not bound to wait while inquiries as to assets, or what proportion Lady Montfort is to pay, are depending. My opinion therefore is, that the Master of the Rolls was perfectly right in charging the trustees in

(*d*) 19 Ves. 635; S. C. 2 Mer. 3.

the *first instance*, and also in deciding, that they have a *remedy over* against those who took the rents and profits which ought to have paid the fine." His Lordship then proceeded to consider the proportion in which the estate of Lord Montfort deceased, and the Dowager Lady Montfort, ought to contribute. "It is a little difficult," he said, "to determine the meaning of these terms in which the tenants for life are charged according to the times they have respectively been in possession. In 1799 (when Lord Montfort died), Lady Montfort was entitled by the settlement to possession of the leasehold estate, under a lease renewed in 1786, for fourteen years, with a fund accumulating for the fine, to be paid on the next renewal in 1800. If therefore the decree is to be understood, that, as Lord Montfort enjoyed from 1772 to 1799, and Lady Montfort from 1799 to 1808, when the fine in question was paid, that sum is to be reimbursed as between his and her estates in this proportion, that his estate is to be charged according to the account of the rents between 1772 and 1799, and she is to pay according to the rents from 1799 to 1808, she appears to me to be charged in a way in which she is not chargeable. My opinion is, that the estate of the late Lord Montfort is to be made answerable to the trustees after they have paid the plaintiff; and Lady Montfort is also answerable, but only for the proportion for which she ought to be called upon, with a due regard to the obligation of the trustees to put her in possession of the estate fully renewed in 1786, and with an accumulating fund to be applied to another renewal in 1800. Lord Montfort having received the rents from 1772 to 1799, and not having renewed, and a much larger fine of course being required at the end of twenty-eight years than

fourteen years, his estate must be answerable for the increase; but if the trustees should not find his estate sufficient to answer that, I cannot, as between them and Lady Montfort, throw any part of the increase upon her. That must therefore fall upon the trustees personally."

In assigning to the *cestui que trust* this remedy against the trustee, it must of course be understood that the *cestui que trust* has not himself concurred in the breach of duty, or subsequently acquiesced in it, and, *à fortiori*, has not executed a formal release.

If a *cestui que trust* concur in the breach of trust, he is for ever estopped from proceeding against the trustee for the consequences of the act (*e*). Thus, in the leading case of *Brice v. Stokes* (*f*), where the trust estate was sold with the approbation of *Brice*, the tenant for life, and the purchase money was improperly left in the hands of one of the trustees with the knowledge of *Brice*, Lord Eldon held, that the trustees were answerable to the remainder-man for the principal, but not to the tenant for life for the interest. "If," said his Lordship, "there are two trustees, and a transaction takes place, in which the fund is taken out of the state in which it ought to have remained, and is not placed in a state in which it ought to be, but is kept in hands which ought not to retain it, if any particular *cestui que trust* has acted in authorizing that as much as the trustee who has not the money in his hands, and continues to permit it to be so treated, in a

(*e*) *Walker v. Symonds*, 3 Sw. 64, per Lord Eldon; *Wilkinson v. Parry*, 4 Russ. 272; *Cocker v. Quayle*, 1 R. & M. 535; *Nail v. Punter*, 5 Sim. 555; *Newman v. Jones*, Rep. t. Finch, 58; and see *Fellows v. Mitchell*, 1 P. W. 81; *Langford v. Gascoyne*, 11 Ves. 336; *White v. White*, 5 Ves. 555; in re *Chertsey Market*, 6 Price, 280, 284, per Lord Chief Baron Richards. (*f*) 11 Ves. 319.

question between that *cestui que trust* and that trustee, the latter shall not be called upon by the former."

But persons cannot *concur* in a breach of trust, who, as *feme covert*s (*g*) and infants (*h*), have no legal capacity to consent to the transaction. Thus, in *Cocker v. Quayle* (*i*), where a trust fund was settled on the wife for life for her *separate use* without power of anticipation (*k*), remainder to the husband for life, remainder to the children, and the trustees were empowered with the written consent of the wife to lend the trust fund to the husband *upon the security of his bond*, and they advanced the money to the husband *with the written consent of the wife*, as they offered to prove, but *without the security of his bond*, they were made responsible for the money to the wife, though not to the husband. "The power of the *feme covert*," as Lord Hardwicke observed upon a similar occasion, "must arise out of the articles, for after the marriage she has no power to prejudice herself. The power is, that she must give her consent to placing out the money *on security*, therefore she could not give her consent to placing out the money *on no security at all* (*l*)."

(*g*) *Ryder v. Bickerton*, cited *Walker v. Symonds*, 3 Sw. 80; *Smith v. French*, 2 Atk. 243; *Needler's case*, Hob. 225; *Lench v. Lench*, 10 Ves. 517, *per* Sir W. Grant; *Lord Montfort v. Lord Cadogan*, 19 Ves. 639, 640, *per* Lord Eldon; and see *Parkes v. White*, 11 Ves. 221.

(*h*) See *supra*, p. 91, 99; and see *Wilkinson v. Parry*, 4 Russ. 276.

(*i*) 1 R. & M. 535.

(*k*) In *Smith v. French*, 2 Atk.

243, there seems to have been no clause against anticipation, yet Lord Hardwicke clearly thought the wife was not so far a *feme sole* in respect of the property settled to her separate use as to enable her to consent to a breach of trust. And see *Nail v. Punter*, 5 Sim. 555.

(*l*) *Ryder v. Bickerton*, cited *Walker v. Symonds*, 3 Sw. 82, *per* Lord Hardwicke.

But neither coverture nor infancy will be a protection from a charge of fraud, and therefore if a *feme covert* (m), or infant (n), ~~knows~~ in a trustee to commit a breach of trust, such *feme covert* or infant cannot afterwards call the trustee to account for having exceeded the line of his duty.

Again, a *cestui que trust*, though he did not concur at the time, may have acquiesced in the breach of trust subsequently (o).

A testator gave 1000*l.*, due to him upon mortgage, to A., B., C., and D., his executors, upon trust to invest in lands to be settled on E. The money was called in, and lent improperly to A. upon the security of his bond, and lost; but, as D., the legatee, had constantly accepted interest on the loan, it was held he had estopped himself by this sanction of the proceeding from holding the trustees responsible for the mischievous consequences (p).

In another case, on the marriage of Mr. Sagar with Miss French, a sum of 1000*l.*, belonging to the lady, was assigned to her mother as trustee, and by indenture executed after the marriage the trusts were declared for the separate use of the wife, remainder to the issue, remainder, if no issue, to the survivor. At the joint solicitation of the husband and wife the money was advanced to the husband, and, with the exception of 350*l.*, was never repaid; but the mother, who was the trustee, had threatened to proceed for the remainder, when the

(m) *Ib. per eundem*; and see 64, *per* Lord Eldon. *Savage v. Foster*, 9 Mod. 35; *Lord Montfort v. Lord Cadogan*, 19 Ves. 640. (p) *Harden v. Parsons*, 1 Ed. 145; and see *Brice v. Stokes*, 11 Ves. 326; *Walker v. Symonds*,

(n) See *supra*, p. 99. 3 Sw. 43-4.

(o) *Walker v. Symonds*, 3 Sw.

daughter fell upon her knees and begged her to desist, as she would release her from all claims. For seven years after the husband's death the widow lived with her mother, and made no demand, but several times offered to execute a release. The daughter then married again, and a bill was filed against the mother to make good the money lost; but Lord Hardwicke said, "I think it comes very near the case of an infant, who, contracting a debt during his minority, shews his consent to it by confirming it after he comes of age, which shall effectively bind him, though it was voidable at his election. So here a promise by the wife to release during the coverture, it is certain, would not bind the wife, but if after the death of her husband she repeats the promise, it is a confirmation of it, and good (q)."

It is almost unnecessary to repeat, that acquiescence cannot be objected against a class of persons, as creditors, with the same degree of force as against a single individual (r).

Lastly, a *cestui que trust* may preclude himself from his remedy against the trustee by executing a formal release of the breach of trust, or giving validity to the transaction by an express *confirmation* (s). And if the *cestui que trust* release the principal in a breach of trust or fraud, (as for the purpose of making him a witness,) he cannot afterwards proceed against the other parties who would have been secondarily liable (t).

But acquiescence, and release or confirmation, to have the effect we have mentioned, must be understood to be accompanied with the following conditions:—

(q) *Smith v. French*, 2 Atk. 103; *Wilkinson v. Parry*, 4 Russ. 243. 272.

(r) See *supra*, p. 391.

(t) *Thompson v. Harrison*, 2

(s) *French v. Hobson*, 9 Ves. B. C. C. 164.

1. As in the case of concurrence, the *cestui que trust* must be *sui juris*, and not a *feme covert* or infant. And in the case of infants, the Court continues its protection even after they have attained twenty-one till such time as they have acquired all proper information (*u*).

2. The *cestui que trust* must be fully conusant of all the facts and circumstances of the case (*x*).

3. The *cestui que trust* must not only be made acquainted with the *facts*, but be also apprised how those facts would be dealt with if brought before a court of equity (*y*).

III. Of the mode and extent of redress in breaches of trust committed by trustees of charities.

1. Of the *mode* of redress.

The regular and ordinary course of proceeding is by way of information (1) in the name of the Attorney-

(*u*) See *Walker v. Symonds*, 3 Sw. 69; *Hicks v. Hicks*, 3 Atk. 274; *Osmond v. Fitzroy*, 3 P. W. 131; *Hylton v. Hylton*, 2 Ves. 547; *Kilbee v. Sneyd*, 2 Moll. 233. of *Chesterfield v. Janssen*, 2 Ves. 146, 149, 152, 158; *Roche v. O'Brien*, 1 B. & B. 339, and the cases there cited; *Bowes v. East London Water Works Company*, 3 Mad. 375.

(*x*) *Adams v. Clifton*, 1 Russ. 297; *Walker v. Symonds*, 3 Sw. 1; *Randall v. Errington*, 10 Ves. 423; *Cockerell v. Cholmeley*, 1 R. & M. 425, per Sir J. Leach; *Bennett v. Colley*, 2 M. & K. 232, per Lord Brougham; and see *Earl* (*y*) *Cockerell v. Cholmeley*, 1 R. & M. 425, per Sir J. Leach; and see *Chesterfield v. Janssen*, 2 Ves. 146, 149, 152, 158; *Bowes v. East London Waterworks Company*, 3 Mad. 384.

(1) Where the management of no charity revenue is concerned, as in a suit instituted by parishioners for the mere purpose of setting aside the nomination of a clerk to the bishop by the trustees of the advowson, the Attorney-General need not be a party: it is the simple case of *cestuis que*

General: the King is *parens patriæ*, and it is the duty of his officer, the Attorney-General, to see that justice is administered to every part of his Majesty's subjects. Relators are necessary on account of costs only, and need not be personally interested (z): as the Attorney-General, prosecuting a suit in the name of the Crown, would not be liable to costs, it might occur, unless some person were made responsible for them, that proceedings might be instituted very oppressive to individuals (a).

In the reign of Elizabeth an Act was passed, commonly called the Statute of Charitable Uses (b), by which the Court of Chancery was empowered to issue commissions to certain persons, including the bishop of the diocese, who were authorized, after summoning a jury of the county where the property was situate, to inquire into any abuse or misapplication of the trust estate. Many of these proceedings were so little consonant to justice, and, on appeal to the Lord Chancellor, were found at once so puzzling, and so far from accomplishing the object in view, that at length the practice of issuing commissions fell into disuse, and people again resorted to the original process by way of information (c).

- (z) *Attorney-General v. Vivian*, 1 Russ. 226. (b) 43 Eliz. c. 4.
 (a) *Corporation of Ludlow v. Greenhouse*, 1 B. N. R. 61, 62, per Lord Redesdale.
 (c) *Corporation of Ludlow v. Greenhouse*, 1 B. N. R. 48, per Lord Redesdale.

trust calling upon the trustees to exercise the legal right; and the suit should be not by information, but by bill. See *Attorney-General v. Parker*, 1 Ves. 43; *S. C.* 3 Atk. 576; *Attorney-General v. Forster*, 10 Ves. 335; *Attorney-General v. Newcombe*, 14 Ves. 1; *Davis v. Jenkins*, 3 V. & B. 151; *Inhabitants of Clapham v. Hewer*, 2 Vern. 387.

After commissions had ceased to be issued, the legislature endeavoured to provide a remedy, not as before, by creating a new jurisdiction, but by giving liberty to proceed under the old jurisdiction in a summary mode. The 52 Geo. 3, c. 101, commonly called Sir Samuel Romilly's Act, and intituled "An Act to provide a summary Remedy in Cases of Abuses of Trusts created for Charitable Purposes," declared that "in every case of a breach of any trust created for charitable purposes, or whenever the direction or order of a court of equity should be deemed necessary for the administration of any trust for charitable purposes, it should be lawful for any two or more persons to present a petition to the Chancellor, Master of the Rolls, or Court of Exchequer, praying such relief as the nature of the case might require, such petition to be heard in a summary way upon affidavits or such other evidence as should be produced, the order made thereon to be final and conclusive, unless appealed against to the House of Lords within two years from the entry thereof." And it was provided that "every petition should be signed by the persons preferring the same in the presence of and be attested by the solicitor or attorney concerned for the petitioners, and should be allowed by his Majesty's Attorney or Solicitor General."

These enactments, though penned by a very able hand, have been strongly reprobated as very loosely and obscurely worded—as tending rather to increase than diminish the expense of the application—in short, to have produced more harm than good. "It was a wise saying," observed Lord Redesdale, "that the farthest way about was often the nearest way home, and he believed that

these summary proceedings would be not always the nearest, or at least not the best way home (*d*)."

Upon the construction of this statute the following points have been resolved:—

1. That, although the act authorizes *any* two or more persons to present the petition, the words must be understood to mean any persons *having an interest* (*e*): and the Court is bound to see not only that the petitioners are possessed of a clear interest, but that they prove themselves to be possessed of the identical interest they allege in their petition (*f*).

2. That the body of the statute is to be governed by the preamble, and therefore will not authorize a petition for setting aside a lease or agreement for a lease (*h*), or indeed for any other purpose than relief against a breach of trust (*h*). But this narrow construction gives no force to the words in the Act, "*or whenever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes;*" and the doctrine, though supported by high authority, has since been called into question (*i*).

3. That the provision extends only to *plain and simple* breaches of trust (*k*), not where a question is involved

(*d*) *Corporation of Ludlow v. Greenhouse*, 1 B. N. R. 66, 67, 81, *per* Lord Redesdale.

(*e*) *In re Bedford Charity*, 2 Sw. 518, *per* Lord Eldon. (*i*) *In re Upton Warren*, 1 M. & K. 410; and see *in re Sleweringe's Charity*, 3 Mer. 707; *ex parte Rees*, 3 V. & B. 12.

(*f*) *Corporation of Ludlow v. Greenhouse*, 1 B. N. R. 91, *per* Lord Eldon. (*k*) *Corporation of Ludlow v. Greenhouse*, 1 Mad. 92, reversed in D. P. 1 B. N. R. 17, see 66,

(*g*) *Ex parte Brown*, Coop. 299.

(*h*) *Corporation of Ludlow v.*

who are the parties entitled to the charity fund, or where any person is interested against whom no breach of trust is alleged (*l*), (for the right of a third person cannot be disposed of on petition (*m*),) or where the relief which is sought is directed against the *assets* of a deceased trustee (*n*).

4. That the allowance "by the Attorney or Solicitor General" must be construed with reference to the previous law upon the subject, and must therefore be taken to mean, not by the Attorney or Solicitor General indifferently, but by the Attorney-General when there is such an officer, and, in the vacancy of that office, by the Solicitor-General (*o*).

5. That if the petition be not so signed by the Attorney or Solicitor General, or if, after signature, it be not duly served, any order made by the Court will be an absolute nullity (*p*), and the petition may be taken off the file for irregularity (*q*).

6. That as the intention of the legislature was to guard the charity fund from abuse, and with that view to prevent proceedings from being instituted, as they frequently were before, for no other reason than because

81, 89; *ex parte Brown*, Coop. 295; *ex parte Skinner*, 2 Mer. 456, 457, *per* Lord Eldon; and see *in re Chertsey Market*, 6 Price, 277.

(*l*) *Corporation of Ludlow v. Greenhouse*, 1 B. N. R. 66, *per* Lord Redesdale; *ex parte Rees*, 3 V. & B. 10; but see *Upton v. Warren*, 1 M. & K. 410.

(*m*) *Corporation of Ludlow v. Greenhouse*, 1 B. N. R. 93, *per* Lord Eldon.

(*n*) *Ex parte Skinner*, Wils. 15, *per* Lord Eldon; *in re Saint Wenn's Charity*, 2 S. & S. 66.

(*o*) *Corporation of Ludlow v. Greenhouse*, 1 B. N. R. 51, 52, 82, *per* Lord Redesdale; *ex parte Skinner*, 2 Mer. 456, *per* Lord Eldon.

(*p*) *Attorney-General v. Green*, 1 J. & W. 305.

(*q*) *In re Dovenby Hospital*, 1 Myl. & Cr. 279.

it was known the costs would be paid out of the charity estate, the Attorney-General, or, in the vacancy of that office, the Solicitor-General, ought not to sanction the petition with his signature, but upon as much deliberation as if the relief were sought by way of information (r).

7. That the Attorney-General by his *allocatur*, or allowance, of the petition, is not *functus officio*, and precluded from all future control, but must be made a party to any subsequent proceedings under the petition, as he would have been to all proceedings by way of information (s).

8. That the Attorney-General, as representing the person of the King in his character of *parens patrias*, is bound to see justice done not only to the plaintiff in the petition, but also to the trustees and other defendants, and therefore is not estopped by his *allocatur* of the petition from afterwards correcting his judgment, but may support or oppose the views of the petitioners as in his discretion he may think fit (t).

9. That when the jurisdiction of the Court has been once attracted by the petition, any subsequent order may be made upon motion without the expense of any further petition (u).

10. That although the Act does not *in terminis* authorize a reference to the Master, yet such an order may be made upon the petition; but the Master must take the evidence thereupon not by interrogatories, either exhibited in his office, or by commissioners duly appointed,

(r) *Ex parte Skinner*, 2 Mer. 271.

456, per Lord Eldon.

(t) *Corporation of Ludlow v.*

(s) *Corporation of Ludlow v.*

Greenhouse, 1 B. N. R. 43—52.

Greenhouse, 1 B. N. R. 51, 65,

(u) *In re Slewing's Charity*,

82, 83, per Lord Redesdale; but

3 Mer. 707; *ex parte Friendly*

see *in re Chertsey Market*, 6 Price,

Society, 10 Ves. 287.

as is usual in causes, but, as directed by the Act upon the hearing of the petition, by affidavit (*x*).

11. Where, in a petition under the Act, the trustees at the hearing did not appear, it was ordered that the trustees should, on the next day of petitions, shew cause why the Court should not make an order according to the prayer of the petition, or such other order as to the Court should seem meet (*y*).

By Sir Edward Sugden's Trustee Act (*z*) it is declared, the provisions of that Act shall extend to all cases of petitions in which the Court is authorized to grant and make summary orders in matters of charity and benefit or friendly societies; and the construction which has been put upon this clause is, that the Court is thereby authorized to make the same orders in petitions of charity and friendly societies as in petitions under the Trustee Act (*a*).

2. Of the *extent* of redress.

Under this head we propose to inquire within what period of time the account of *mesne* rents and profits directed against the person guilty of the breach of trust will be restricted.

It has been stated in a former page that to suits for relief in equity there exist but three bars: first, a statute of limitations; secondly, the presumption of an act which, if done, is an answer to the plaintiff's demand; or, thirdly, the public or private inconvenience that would arise from the Court's interference (*b*).

(*x*) *Ex parte Greenhouse*, 1 Wils. 18; S. C. 1 Sw. 60.

(*y*) *Ex parte Seagears*, 1 V. & B. 496.

(*z*) 11 G. 4. & 1 W. 4. c. 60. s. 21.

(*a*) *In re Friendly Society*, 1 S. & S. 82.

(*b*) *Attorney-General v. Mayor of Exeter*, Jac. 448, per Sir T. Plumer.

1. It is clear that informations against trustees of charities (the trust being not constructive but direct) are not within the purview of the *statutes of limitations* (c). It was formerly held, that, although the statute was not an absolute bar, yet the Court would be governed by the same period, as a good rule how far back to carry the account (d); but at the present day the doctrine has been denied, and the Court professes to pay no attention whatever to the limitation of any statute (e).

2. It was observed by Sir T. Palmer, that *presumption* also did not apply to the case of trustee and *cestui que trust* (f). However, although the Court will not presume the *cestui que trust* to have released his right to the estate, it may presume the employment of the funds in a particular manner to have been by the direction or with the consent of the *cestui que trust*. In *Attorney-General v. Scott* (g) the parishioners had purchased an advowson by subscription in the names of trustees; and by a decree of the Court the advowson had been vested in twenty-five of the principal inhabitants, upon trust to elect and present a proper clerk, the presentation to be approved by certain assistant preachers. The trustees, for a century, had been in the habit of electing and presenting without such approbation; and, the last election being disputed as irregular for want of that formality, Lord Hardwicke said, "The general disusage was evidence of the consent of the parishioners to lay aside that part of

(c) *Attorney-General v. Mayor of Exeter*, Jac. 448, per Sir T. Plumer; *Attorney-General v. Brewers' Company*, 1 Mer. 498, per Sir W. Grant.

(d) *Love v. Eade*, Rep. t. Finch. 269; 2 Eq. Ca. Ab. 12, pl. 20.

(e) *Attorney-General v. Mayor of Exeter*, *Attorney-General v. Brewers' Company*, ubi supra.

(f) *Attorney-General v. Mayor of Exeter*, ubi supra.

(g) 1 Ves. 413; and see in re *Chertsey Market*, 6 Price, 280.

the constitution as useless : he would presume the common consent of the trustees and parishioners to lay aside the custom, as the Court would presume an ancient by-law to vary the constitution of a corporation."

3. The Court may set a limit to the account on the ground of *inconvenience* ; and this bar applies in its full force to cases of charities. " It is the constant practice of courts of equity," said Sir Thomas Plumer, " to discourage stale demands ; and this principle has often been acted upon in cases of charities. When there has been a long period, during which a party has, under an innocent mistake, misapplied a trust fund from the *laches* and neglect of others, that is, from no one of the public setting him right, and when the accounts have, in consequence, become entangled, the Court, under its general discretion, considering the enormous expense of the inquiries, and the great hardship of calling upon representatives to refund, what families, acting on the notion of its being their property, have spent, has been in the habit, while giving relief, of fixing a period to the amount. The result of the authorities is, that in each case the Court is bound to be guided by the particular circumstances (*h*)."

In *Attorney-General v. The Corporation of Stafford* (*i*) the trustees in their answer, filed in 1811, had furnished accounts of the trust estate from the year 1791, and Lord Gifford saw no inconvenience in decreeing the account as far back as the trustees themselves had stated it, but refused to extend it farther.

Where no inconvenience can be objected, the Court

(*h*) *Attorney-General v. Mayor of Exeter*, Jac. 448. (*i*) 1 Russ. 547.

will carry back the account to the time of commencement of the misapplication, or at least up to the period, when the plaintiff's title to the fund first accrued.

In *Attorney-General v. The Mayor of Exeter* (*k*) the defendants admitted by their answer, they had been in possession of the charity estate for the last 200 years, and had applied considerable parts of the rents and profits to the purposes of the charity, and that the residue of the rents and profits, the amount of which would appear from their books, they had always been ready and willing to apply; and Sir W. Grant decreed an account of the rents and profits without any limitation of time. Sir T. Plumer, before whom the cause was reheard, observed, "Suppose the case of trustees called upon to account for the receipts of two or three hundred years, who admit the receipt, and say they have conscientiously laid up the money, and that they have it ready for the charity, or that they have invested it in the funds or in land, unmixed with other money. What is the Court to do? Can the Court give to the trustees a part of the money or land which they acknowledge not to be theirs? It is admitted to belong to the charity, and the charity must have it. There is no difficulty from complicated accounts: all the topics of hardship that may sometimes be urged, fail of application to this case." And his Honor compelled the defendants to account for the rents and profits for the whole period of 200 years.

In *Attorney-General v. The Brewers' Company* (*l*) an estate had been vested in that company upon trust for the repairs of the Harrow Road; and, by an Act

(*k*) Jac. 443.

(*l*) 1 Mer. 495.

of 19 Geo. 3, the proprietors of all lands chargeable with the said repairs were directed to pay the sums which should be so charged to certain trustees appointed by the Act. About 1810 an information was filed in the name of the Attorney-General, the trustees under the Act being the relators, for an account of the rents and profits which the company had not applied. Sir W. Grant said, "It was a point not yet decided, from what period a corporate body should account in matters of trust; for to give the account only from six years would be to create an analogy between a trust account and a common account. However, the Act which had been passed was not meant to have a retrospective operation, and the trustees under that act could not say they had a right to the accumulated fund from any antecedent period; and the Attorney-General, suing at the relation of the trustees, could have only such an account as the trustees themselves would be entitled to;" and therefore his Honor directed the account to be taken from the date of the Act of Parliament, a period of about thirty years.

But where the trustees have diverted the charity-funds from their proper channel through *mistake*, it is now settled, the Court will not call back any disbursements made before the filing of the information (*m*), or before the trustees had notice that the propriety of such application would be called into question (*n*). The Court holds a strict hand over trustees where there is any wil-

(*m*) *Attorney-General v. Corporation of Exeter*, 2 Russ. 45; af-

firmed, 3 Russ. 895; *Attorney-General v. Dean of Christchurch*, Jac. 474, 637; *S. C.* 2 Russ. 321; *Attorney-General v. Rigby*,

3 P. W. 145.

(*n*) *Attorney-General v. Burgesses of East Relford*, 2 M. & K. 35, see 37; and see *Attorney-General v. Corporation of Berwick-upon-Tweed*, Tambl. 239.

ful misemployment; but where the Court sees nothing but mistake, while it gives directions for the better management in future, it refuses to visit with punishment what has been transacted in time past. To carry back the account to the very commencement of the misapplication would be the ruin of half the corporations in the kingdom (*o*); besides that to act on such a principle would be a discouragement to all prudent persons to undertake the office of trustees of charities (*p*).

If an individual make an annual payment for a particular purpose out of the profits of his estate, it is a reasonable presumption, from the strong interest which he has to resist an unfounded demand, that he has inquired the origin of the claim, and he is therefore fixed with implied notice of all the circumstances that attend it; but the same presumption cannot be applied to corporations, because, having no immediate personal interest in the application of the profits of the corporate property, they may, without the imputation of culpable negligence, adopt and follow the practice of their predecessors (*q*).

If the trustee has, in breach of his duty, disposed of the *corpus* of the estate, it seems the Attorney-General, as representing the interests of the charity, may take the purchase-money with interest at five per cent., or the present value of the lands after allowances for improvements (*r*).

(*o*) *Attorney-General v. Burgesses of East Retford*, 2 M. & K. 37, per Sir J. Leach.

(*p*) *Attorney-General v. Corporation of Exeter*, 2 Russ. 54, per Lord Eldon.

(*q*) *Attorney-General v. Bur-*

gesses of East Retford, 2 M. & K. 38, per Sir J. Leach.

(*r*) See *Attorney-General v. East Retford*, 2 M. & K. 35, see 38, 39; and see *Attorney-General v. Lloyd*, 6 Mad. 92.

CHAPTER XXIX.

MAXIMS OF EQUITY FOR SUSTAINING THE TRUE CHARACTER
OF THE TRUST ESTATE AGAINST THE LACHES OR TORT OF
THE TRUSTEE.

BESIDES the several rights and remedies which have just been the subject of discussion, the Court, with the view of *keeping the trust estate in its regular channel, and sustaining its proper character, whether of realty or personalty, against the laches or other misbehaviour of the trustee*, has found it necessary to establish two maxims, which we now proceed to examine: viz., first, What ought to be done shall be considered as done (a); and, secondly, The act of the trustee shall not alter the nature of the *cestui que trust's* estate (b).

I. What ought to be done shall be considered as done.

“The forbearance of the trustees,” said Sir J. Jekyll,

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| <p>(a) <i>Walker v. Denne</i>, 2 Ves. jun. 183, <i>per</i> Lord Loughborough; <i>Foone v. Blount</i>, Cowp. 467, <i>per</i> Lord Mansfield; <i>Holland v. Hughes</i>, 16 Ves. 114, <i>per</i> Sir W. Grant; <i>Gaskell v. Harman</i>, 11 Ves. 507, <i>per</i> Lord Eldon; <i>Stead v. Newdigate</i>, 2 Mer. 530, <i>per</i> Sir W. Grant; <i>Pulteney v. Darlington</i>, 1 B. C. C. 237, <i>per</i> Lord Thurlow; <i>Burgess v. Wheate</i>, 1</p> | <p>Ed. 186, <i>per</i> Sir T. Clarke; <i>Lechmere v. Earl of Carlisle</i>, 3 P. W. 215, <i>per</i> Sir J. Jekyll; <i>Guidot v. Guidot</i>, 3 Atk. 256, <i>per</i> Lord Hardwicke; <i>Crabtree v. Bramble</i>, Ib. 687, <i>per eundem</i>; <i>Trafford v. Boehm</i>, Ib. 446, <i>per eundem</i>; &c.
(b) <i>Philips v. Brydges</i>, 3 Ves. 127, <i>per</i> Lord Alvanley; <i>Earlom v. Saunders</i>, Amb. 242, <i>per</i> Lord Hardwicke.</p> |
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“in not doing what it was their office to have done, shall in no sort prejudice the *cestuis que trust*, since at that rate it would be in the power of trustees, either by doing or delaying to do their duty, to affect the right of other persons; which can never be maintained. Wherefore the rule in such cases is, that what ought to have been done shall be taken as done, and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money (c).” And Lord Macclesfield, in the case of a bequest to a trustee for purchasing lands, observed, “If the purchase had been made it must have gone to the heir, but if the trustee, by delaying the purchase, might alter the right, and give it to the executors, this would be to *make it the will of the trustee, and not the will of the testator, which would be very unreasonable and inconvenient* (d).”

Upon these grounds it is in equity a universal rule, that money directed to be employed in the purchase of land, or land directed to be sold and turned into money, shall be considered as that species of property into which it is directed to be converted; and this, in whatever manner the direction is given, whether by will, by way of contract, by marriage articles, by settlement or otherwise, and whether the money has been actually deposited in the hands of trustees for the purpose, or is only covenanted to be paid, whether the land has been actually conveyed, or is only agreed to be conveyed (e).

Thus, if money be stipulated to be laid out in land to be settled on a *feme covert* in fee or in tail, the husband of

(c) *Lechmere v. Earl of Carlisle*, 3 P. W. 215.

(d) *Scudamore v. Scudamore*, Pr. Ch. 543.

(e) *Fletcher v. Ashburner*, 1 B. C. C. 499; and see *Wheldale v. Partridge*, 5 Ves. 396.

the *feme* is entitled to his curtesy, though no purchase be actually made in the lifetime of the wife; and he will be decreed the interest of the money until a purchase can be found; and, when the investment has been made, he will have a life estate in the lands (*f*).

Whether a widow can under similar circumstances establish her title to dower, has not been equally ascertained. It is readily admitted she is not dowable of a *mere trust estate* (*g*); but, where money is to be converted into land, the interest is only prevented from being legal through the forbearance of the trustee, and the rights of parties ought not to be varied by the neglect of the person who is merely the nominal instrument.

It cannot be denied that the widow of a *cestui que trust* has a *general equity*. "Marriage," said Sir J. Jekyll, "is in its nature a *civil*, and in its celebration a *sacred* contract, and the obligation is a consideration moving from each of the contracting parties to the other, and from this obligation arises an equity to the wife in several cases without any previous agreement, as to make good a defective execution of a power, or defective conveyance, or supply the defect of surrender of copyhold estate: in all which the Court relieves the wife, and makes a provision for her, where it is not unreasonable or injurious to others (*h*)."
And he afterwards added, "I cannot but wonder how it ever came to be thought that a tenant by the curtesy was entitled to relief in equity more or farther than a dowress, and particularly that a tenancy by the curtesy may be of a trust estate, but not

(*f*) *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 4 W. 4, c. 105.

1 Ves. 174; *Dodson v. Hay*, 3 B. C. C. 405. (*h*) *Banks v. Sutton*, 2 P. W. 704.

dower, which is no less than a direct opposition to the rule and reason of the law, which allows *dower* of a *seisin* in law, but not a *tenancy by the curtesy*, because the wife cannot gain an actual *seisin*, but the husband may; which reason holds in a trust estate; for the wife cannot gain or compel a trustee to convey the legal estate to the husband, but the husband himself may; therefore, if any distinction is to be made, dower, one would think, ought to be preferred to curtesy (i)." If the wife, therefore, have this *general equity*, why may she not come into Chancery, and plead the rule of Court that what ought to be done shall be taken as done—that, as the equitable estate should have been made a legal estate, it ought to be so considered in respect of dower?

The decision in the old case of *Fletcher v. Robinson* (k) appears to turn upon this principle. Henry, the father, promised for valuable consideration to settle certain lands in York upon Henry, the son, in fee, but afterwards, falling into trouble from having counterfeited a patent, he conveyed the estate to John, his younger son, in fee, for the purpose of preventing a forfeiture. The father subsequently executed a conveyance to Henry and his heirs in pursuance of the original contract, but, as the intermediate disposition had vested the legal estate in John, there passed only the equitable interest. Henry, the son, died, and the question arose, whether, as the legal estate was still outstanding, the widow should be entitled to dower; and it was decreed in the affirmative. The ground of the determination apparently was, that as Henry, the

(i) *Banks v. Sutton*, 2 P. W. Dudley, Pr. Ch. 250, and stated from Reg. Lib. *Banks v. Sutton*, 706.

(k) Cited *Lord Dudley v. Lady* 2 P. W. 709.

father, would, except for the fraud, have conveyed the legal estate to Henry, the son, the widow should equally have her dower as if the conveyance had been actually executed.

In *Otway v. Hudson* (l) the tenant in tail of an equitable interest requested the trustees to surrender the legal estate to him in tail, which they refused to do; and he then filed a bill in equity to compel the surrender. He also went to the lord's court during the pendency of the suit, and desired to be admitted; but, as the legal estate was in the trustees, the application was refused. Before a decree could be obtained, the tenant in tail died, and it was determined the widow was entitled to dower.

With respect to *Banks v. Sutton* (m), it is certain that many of the doctrines there laid down have been overruled by subsequent cases, but as regards the question under discussion, it seems to be still a binding authority. Hancock, seised of lands in fee, mortgaged them to Ward in fee, and afterwards made his will, and devised them to Ellis in trust to pay his debts and legacies, and to bring up and educate Sutton until twenty-one, or marriage, and then to settle a moiety of the estate upon him, and the heirs of his body. Ellis, the trustee, paid off the mortgage, and took an assignment of it in trust for himself, but neglected to settle the moiety on Sutton in tail on his attaining twenty-one. Sutton died, and his widow filed a bill in equity for her dower. Sir J. Jekyll said, "The question is, whether the widow of a tenant in tail of a trust, to whom the legal estate is by the will directed to be conveyed at his age of twenty-one years, and who lives to that age, shall have the aid of equity to help her to dower;" and, after discussing at considerable length

(l) 2 Vern. 583.

(m) 2 P. W. 700.

in what cases *generally* a widow's claim to dower of a trust should be allowed, he concluded thus: "But after all these reasons and authorities, I must declare that I would not take upon myself to determine, whether a wife should have dower out of a trust of inheritance, *where no time is limited for conveying the legal estate, and that time come in the lifetime of the plaintiff's husband*. This makes it clear for dower upon a principle well known and established in this Court—that where an act is to be done by a trustee, that is to be looked upon as done, which ought to have been done. Consequently, the estate directed to be conveyed to the plaintiff's husband ought to be considered as actually conveyed to and vested in him, and then the plaintiff hath a right to dower out of it (n)."

Thus there are several early authorities in favour of dower: on the other hand it must not be concealed, that the opinion of Lord Hardwicke was on more than one occasion expressed adversely to the doctrine (o). Except as to marriages celebrated on or before the 1st day of January, 1834, the question is now immaterial; for, as regards marriages subsequent to that period, the Legislature has given dower out of every species of trust estate; subject to be defeated, however, by any declaration of intention on the part of the husband (p).

Upon the principle under discussion it has also been argued, that if money be articted, or directed, to be paid out in land to be settled on a person in fee, if the *cestui que trust* die without heirs, the money shall, as land,

(n) 2 P. W. 715.

3 Atk. 687.

(o) See *Cunningham v. Moody*,

(p) 3 & 4 Will. 4, c. 105.

1 Ves. 176; *Crabtree v. Bramble*,

escheat to the lord: but between dower and escheat there is, it is submitted, this manifest distinction; that a widow claims *through* her husband, and has a general equity, which gives her *locus standi* in Court; but a lord by escheat comes under no head of equity—is entirely a stranger to the trust, claiming by title paramount of his own (q). The pretence for his claim is, that the operation of the rule so absolutely converts the equitable into a legal estate, that all the incidents, that would have belonged to the legal, must be considered in Chancery as attached to the equitable; but the rule was not meant to subvert the nature of a trust, but to be subservient to it—not to benefit third persons, but to protect the interest of parties privies to the trust. And of this opinion was Sir T. Clarke in the case of *Burgess v. Wheate* (r). There A., seised *ex parte paternā*, conveyed the estate to trustees in trust for herself, her heirs and assigns, and died without heir of the paternal line, but leaving an heir of the maternal; and it was argued in favour of the heir *ex parte maternā*, that, as the *cestui que trust* might at any time have called upon the trustees to convey, and equity looked upon what ought to have been done as done, the Court would by a fiction consider the conveyance of the legal estate as actually executed; and then, in default of heirs of the paternal line, the lands would descend to the heir *ex parte maternā*. But the Master of the Rolls said, “Had such a conveyance been executed, it would have been like a feoffment and refoffment, and have made A. seised of a new use; but, as this was not

(q) *Walker v. Denne*, 2 Ves. (r) 1 Ed. 177; *S. C.* 1 W. jun. 185, *per* Lord Loughborough. Blacket. Rep. 123.

done, the consequences insisted on will not follow; for nothing is looked upon in equity as done but what *ought* to have been done—not what *might* have been done; nor will equity consider things in that light in favour of every body, but only of those who had a right to pray it might be done. The rule is, that it shall be either between the parties who stipulate what is to be done, or those who stand in their place. A. never prayed a conveyance, and one cannot tell whether she ever would, and the maternal heir is not to be considered as a privy in blood, but a mere stranger (s).” As the lord by escheat claims not in privy, it is evident, that, according to Sir T. Clarke’s construction of the rule, he has no title to a *subpena*.

As money to be laid out in land is regarded as land, it cannot be devised by an infant, though of sufficient age to bequeath personal estate (†) ; and, for the same reason, it will pass by the *cestui que trust*’s will under the general description of all the testator’s lands (‡), or of all his lands in the county of ——— or elsewhere (x); though in the latter case it may very plausibly be contended, that the testator could not have referred to money, but must have alluded to something that possessed a local character.

So money to be converted into land is bound by a judgment (y), but was never accounted personal assets,

(s) 1 Ed. 186.

(†) *Earlom v. Saunders*, Amb. 241.

(‡) *Guidot v. Guidot*, 3 Atk. 256, per Lord Hardwicke; *Rashley v. Masters*, 1 Ves. jun. 201; *S. C.* 3 B. C. C. 99; *Green v.*

Stephens, 17 Ves. 77; *Biddulph v. Biddulph*, 12 Ves. 161.

(x) *Lingen v. Souray*, 1 P. W. 172; *Guidot v. Guidot*, 3 Atk. 254.

(y) *Frederick v. Dymcombe*, 1 Atk. 392.

and therefore was not, until the late Act (s), liable to the payment of simple-contract debts (b).

So a gift by a parent to a child of money to be laid out in land is considered a purchase by the father, and a donation of the estate, and the child is not bound, before receiving his orphanage share, to bring the purchase into hotchpot (b).

With respect to the *heir* of the person upon whom the lands, when purchased, are directed or agreed to be settled, it is necessary, for ascertaining his rights, to distinguish between the cases where the real representative claims as against a *stranger*, and where he claims as against the *executor of his own ancestor*.

It appears to be perfectly established that the heir is entitled to the money as land, if he seek to enforce his equity against a *stranger*. Thus, 1. If a sum of money be *bequeathed* to be laid out in a purchase of lands to be settled to the use of A. and his heirs, and A. die before a purchase has been obtained, the money is the property, not of the executor, but of the heir of A. (c). 2. If on the marriage of A. money be *actually*

(s) 3 & 4 W. 4, c. 104.

(a) *Whitwick v. Jermin*, cited *Baden v. Earl of Pembroke*, 2 Vern. 58; *Lawrence v. Beverley*, cited Ib. 55; *S. C.* 2 Keb. 841; *Fulham v. Jones*, cited *Pulteney v. Darlington*, 7 B. P. C. 550; *Foane v. Blount*, Cowp. 467, per Lord Mansfield.

(b) *Hume v. Edwards*, 3 Atk. 450; *Annand v. Honeywood*, 1 Vern. 345.

(c) *Scudamore v. Scudamore*, Pr. Ch. 543. *Abbot v. Lee*, 2

Vern. 284, at first sight appears *contra*, but it seems from the Registrar's book that the direction for conversion was not imperative, but to be at the discretion of the testator's executors. Had the money been absolutely converted into land, the ultimate remainder by failure of issue of the surviving daughter would have resulted to the executors of the *testator*, but, as money to be converted and settled in tail upon a discretion which was not exercised, it belonged to the admi-

deposited in the hands of trustees, either by A. himself or by a stranger, to be laid out in a purchase of lands to be settled to the use of A. for life, remainder to his wife for life, remainder to the issue in tail, remainder to A. in fee, and A. die without issue, his heir, and not his executor, is entitled (*d*). 3. If on the marriage of A. there be a *covenant* on the part of B. to lay out money in a purchase of lands to the above uses, and A. die without issue, his heir claims the benefit of the covenant (*e*).

But if the heir have to enforce his claim, not against a stranger, but against the *personal representative of his own ancestor*, as if A. on his marriage covenant to lay out money in a purchase of lands to be settled to the use of himself for life, remainder to his wife for life, remainder to the issue in tail, remainder to his own right heirs, in this instance the question whether the heir can call upon the executor for the money must depend upon this further distinction:—

1. If at the death of A. there be an equitable interest in the fund outstanding in another, as a life estate in the wife, or an estate tail in the issue, then the real quality of the money is sustained and continued by that right, and the heir of A. is entitled to call upon A.'s executor (*f*), and if there be such an outstanding claim at the death of the ancestor, the circumstance that the heir

nistrators of the legatee, as was decreed by the Court. See the case stated from Reg. Lib. Appendix, No. 6.

(*d*) *Disher v. Disher*, 1 P. W. 204; *Chaplin v. Horner*, Ib. 483; *Edwards v. Countess of Warwick*, 2 P. W. 171; and see *Lechmere v. Lechmere*, Cas. t. Talb. 90.

(*e*) *Knight v. Atkyns*, 2 Vern. 20.

(*f*) *Kettleby v. Atwood*, 1 Vern. 298; reheard Ib. 471; *Lanoy v. Fairechild*, 2 Vern. 101; *Chaplin v. Horner*, 1 P. W. 483; *Lechmere v. Earl of Carlisle*, 3 P. W. 211; affirmed, Cas. t. Talbot, 80; *Oldham v. Hughes*, 2 Atk. 452.

institutes his suit during the subsistence of that claim, or after its determination, seems to be perfectly immaterial (g).

In *Walker v. Denne* (h) Lord Loughborough expressed some doubt upon this doctrine. "Is there," he said, "any case where the heir has filed a bill merely as such, and has had money paid to him, because it was directed to be laid out in land? The idea is commonly entertained, but there are doubts about it. I do not recollect any case where the heir has said, The money ought to be laid out—all the particular objects are gone, and I as heir claim the money as land for my benefit. Upon that I doubt what gives the heir a title to a *subpoena* in this Court: between the heir and personal representative their rights are pure legal rights: chance decides what shall be real, what personal: neither has a *scintilla* of equity to make the property that which it is not in fact." To this reasoning of Lord Loughborough it may be replied, that, when it is said there is no equity between the real and personal representatives, the meaning is no more than this,—that what is real estate at the death of the ancestor will go to the heir, and what is personal estate at the death of the testator will go to the executor; but, for the purpose of determining what is real and what is personal estate, the Court is guided, not by the *legal* nature of the property at the death of the owner, but, as appears in numerous instances, by the stamp and character impressed upon it in consideration of a court of equity. Thus if a *mortgagee in fee* die, the mortgage being

(g) See *Chaplin v. Horner*, 1 P. W. 483; *Lechmere v. Lechmere*, Cas. t. Talb. 80. and see *Oxenden v. Lord Compton*, Ib. 70; *Lord Compton v. Oxenden*, Ib. 265.

(h) 2 Ves. jun. 175, 176, 183;

regarded as a mere security for part of the mortgagor's personal estate, the executor may call upon the heir for a conveyance of the land. On the other hand, if the mortgagor die, the heir of the mortgagor may call on the executor to discharge the incumbrance out of the personal assets. So if a person contract for the sale of an estate, and die before the completion of the sale, the legal fee descends upon the heir, but the purchase money passes to the executor; and, on the other hand, if a person contract for the purchase of an estate, and die, the executor must pay the money, but the heir is entitled to the purchase. Thus, in the words of Lord Talbot, "Where the dispute is between the two representatives of the deceased, the one of his real, the other of his personal estate, the heir's being but a volunteer in regard to his ancestor will not exclude him from the aid of the Court, for though the question is between two volunteers, the Court will determine which way the right is, and will decree accordingly (i)." "I am disposed," said Lord Eldon, "to say, notwithstanding the opinion of Lord Rosslyn in *Walker v. Deme*, and some other modern authorities, that if the instrument be taken to impress a fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly and plainly impressed with real uses as land, and one of those uses being for the benefit of the heir, it will remain for his benefit, and it is not correct to say the Court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir (k)." And Sir W. Grant

(i) *Lechmere v. Lechmere*, Cas. t. Talb. 90.

(k) *Wheldale v. Partridge*, 8 Ves. 235.

to the same effect observed, "There is no weight in the circumstance that the property is found in the shape of money or land, *for the character is to be found in the deed.* The opinion of Lord Rosslyn that property was to be taken as it happened to be at the death of the party from whom the representatives claimed, was much doubted by Lord Eldon, who held, *in which I perfectly concur*, it must be considered as being in the state in which it *ought to be.* Lord Rosslyn's rule was new, and not according to prior cases (l)."

2. But if A. die, leaving neither wife nor issue, so that, to use the technical expression, the money is "at home," that is, A. at the time of his death is the absolute and exclusive owner, and there is no outstanding right in another person, in this case the real quality of the money has become merged and extinguished, and on the death of A. the heir has no equity to call upon the executor. To keep on foot the *notional* conversion of money into land, it is evident there must be a right in some one to insist upon the *actual* conversion; but if A. be in possession of 20,000*l.* upon trust to lay out in a purchase of lands to be settled to the use of himself and his heirs, the right and the thing both centering in the same person, there is nobody to sue, and it follows the action is extinguished (m).

The decision in the much litigated case of *Chichester v. Bickerstaff* (n) amounted probably to no more than this. On the marriage of Sir J. Chichester with the daughter of Sir C. Bickerstaff, the latter agreed to pay 1500*l.* by way

(l) *Thornton v. Hawley*, 10 1 B. C. C. 237.
 Ves. 138; *Kirkman v. Miles*, 13 (n) 2 Vern. 295; *S. C.* cited
 Ves. 339. *Pulteney v. Darlington*, 7 B. P. C.
 (m) See *Pulteney v. Darlington*, 554.

of portion, which, together with 1500*l.* more to be advanced by Sir John Chichester within three years after the marriage, was to be invested in lands to be settled on Sir John for life, remainder to his wife for life, remainder to the issue in tail, remainder to Sir John in fee. Sir John and his lady within one year after the marriage both died without issue, the husband having survived. Sir John by his will made Sir C. Bickerstaff his executor, and bequeathed the residue of his personal estate, after payment of his debts, &c., to Frances Chichester his sister. The heir at law of Sir John brought his bill against Sir Charles to compel him to pay the 1500*l.*, insisting that by virtue of the marriage articles the money ought to be looked upon as land, and therefore belonged to him as heir. Lord Somers said, "This money, though once bound by the articles, yet when the wife died without issue became free again, and was under the power and dispose of Sir John, as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and this is much stronger where there is a residuary legatee;" and therefore dismissed the bill. Then follows what is apparently the note of the reporter, viz., that "money shall in many cases be considered as land when bound by articles in order to a purchase, but whilst it remains still money, and no purchase made, the same shall be deemed as part of the personal estate of such person, who might have aliened the land in case a purchase had been made."

In this case it has been commonly, but surely without reason, supposed, that the suit of the plaintiff was for the 1500*l.* which Sir Charles had articted to pay,

and in consequence of this misconception the authority of the decision has repeatedly been called into question. Thus Sir J. Jekyll, overlooking the very material circumstance that Sir Charles had been appointed the executor of the testator, observes, "It is remarkable with respect to this case, that the wife died within three years after the marriage, during which period the purchase was to be made, so that the time was not come within which the money was to be laid out; and till then it continued money; and possibly the Court had some evidence to induce them to believe, that Sir John Chichester looked on the money as personal estate; and if *this does not distinguish it from other cases, I doubt, in opposition to so many decrees, the resolution here given would hardly be maintainable (o).*" And Lord Talbot was apparently under the same misapprehension, for he observes, "Had the money in the case before me been *deposited in the hands of trustees*, it must have been looked upon as real estate, and the heir have been entitled. This seems to be granted, and no authority against it but what has been collected from the case of *Chichester v. Bickerstaff*. It is probable the Court went upon some reason, which induced it to think that Sir John looked upon that money as personal estate, for otherwise *the authority of that case is not to be maintained, being contrary to all former resolutions (p).*" But Lord Thurlow viewed the case in a different light, and evidently considered the 1500*l.* sought by the bill of the plaintiff to be the 1500*l.* articulated to be paid by the testator himself, and so payable out of his assets in the hands of Sir

(o) *Lechmere v. Carlisle*, 3 P. W. 221.

(p) *Lechmere v. Lechmere*, Cas. t. Talb. 90.

John Bickerstaff his executor. "Where," said his Lordship, "a sum of money is *in the hands of one without any other use but for himself*, it will be money, and the heir cannot claim, *like the case of Chichester v. Bickerstaff*, against which I think there is no judgment; though there are a number of opinions. I know no better authority than that case (g)."

The Registrar's book has been searched, but the decree cannot be found. It appears, however, from a motion in the cause for dissolving an injunction, that the circumstances of the case were as follows:—Sir Charles Bickerstaff had brought an action at law against the plaintiff, and had obtained judgment for a certain sum upon a balance of accounts. Upon this the plaintiff instituted a suit in equity for staying the proceedings at law, alleging, that Sir Charles stood indebted to him in the sum of £3000l., to which the plaintiff was entitled as heir at law of Sir John, under Sir John's marriage articles. It was ordered by the Court that judgment should be entered up, but execution should be stayed till the cause should be heard the Easter term following. As Vernon, the reporter, speaks only of one sum of £1500l., to which the executor was declared entitled, it is probable the other sum was adjudged to the heir, a decision that would in every respect be conformable to principle; for while the £1500l. covenanted to be paid by Sir John himself was, by the death of his wife without issue in his lifetime, "at home," and therefore set free from the articles, the other sum of £1500l., which was covenanted to be paid by Sir Charles, was outstanding in the hands of Sir Charles as trustee, and would therefore retain

(g) *Pulteney v. Darlington*, 1 B. C. C. 238.

the character of real estate until some act by Sir John to remove that impression.

To the principle under consideration must be referred the case of *Pulteney v. Darlington* (r). Henry Guy the testator appointed Lord Bath, Tylour, and Lake his executors, and devised to them, their heirs and assigns, all his estates at Earl's Court, and certain freeholds and copyholds at Muswell Hill, upon trust to sell, and directed that, after payment of his debts and legacies, all such monies or other personal estate as should remain in the hands of the executors, or be raised by sale of the devised estates, should be laid out in the purchase of lands to be settled to the use of Lord Bath for life, remainder to the first and other sons in tail, remainder to General Pulteney for life, remainder to the first and other sons in tail, remainder to Daniel Pulteney for life, remainder to the first and other sons in tail, with a remainder in fee to the father of Lord Bath, which afterwards became vested in Lord Bath himself. The testator died in 1710. Daniel died without issue in the lifetime of Lord Bath and General Pulteney. Lord Bath had issue a son, who died, without having disturbed the settlement, in the lifetime of his father. General Pulteney never had any issue. Lord Bath, who acted in the executorship, retained in his hands the sum of 23,488*l.* upon the trusts of the will; and, after the decease of Daniel and of his own son, by his will, bearing date in 1763, devised all his real and personal estate to General Pulteney, and appointed him executor; so that, whether the sum of 23,488*l.* was to be regarded as the real or as the personal estate of Lord Bath, *utraque vid*

(r) 1 B. C. C. 223.

datâ it became vested in General Pulteney under this devise and bequest. General Pulteney proved the will, took possession of the estates, and transferred the securities upon which the 23,488*l.* was invested into his own name. By his will bearing date in 1767, General Pulteney devised all his estates in Middlesex, Salop, and York to certain uses, and gave all his money, *securities*, goods, chattels, and personal estate to his executors upon certain trusts ; so that, under General Pulteney's will, if the 23,488*l.* was, under the circumstances, to be taken as land, then, for want of a general devise, it had descended upon the plaintiff as General Pulteney's heir ; but if it was to be regarded as personalty, it was included in the bequest of the General's personal estate. Lord Bathurst, before whom the cause was first heard, conceived the heir had no title, and dismissed the bill. It was afterwards reheard before Lord Thurlow, who affirmed the decree upon two grounds ; first, that the money was " at home," the possibility of issue having, on the death of General Pulteney, the surviving tenant for life, become extinct, and therefore, at his decease, there was no claim upon the fund outstanding in any other person ; and, secondly, that General Pulteney had manifested a disposition to destroy the impression of real estate, and continue the fund as money. His Lordship said, " If there be no legal or equitable title out against the party who is in possession of the fund, there the rule, that when the right and the thing centre in one and the same person the action is extinguished, applies, and the heir cannot say there was a use for him ;" and then, after commenting upon the numerous decisions upon the subject, his Lordship continued : " The use that I make of these cases, notwithstanding the *dicta* they contain, is

this, that where a sum of money is in the hands of one without any other use but for himself, it will be money, and the heir cannot claim. But whether that is clearly so or not, circumstances of demeanour in the person, even though slight, will be sufficient to decide it: a very little would do: receiving it from the trustees there is no doubt would be sufficient: Lord Bath did receive it—he had it in his hands. Suppose he had it by way of covenant: otherwise, where would there be an end? If he kept it subject to a covenant to lay it out for fifty years, should the heir come for it at the end of that term? It would lead to infinite inconveniences.” The decree was afterwards affirmed in the House of Lords, and upon the ground, as stated by Lord Eldon, that the money was “at home (s).”

Of course the money will be “at home” where the person absolutely entitled to the fund receives it from the trustee the depository of it, and that whether the payment be made with the sanction of the Court, or by the voluntary act of the trustee himself (t).

If a testator bequeath a sum of money to be laid out in lands, to be settled to certain uses, with the ultimate remainder to his *own right heirs*, and the prior limitations fail, the heir may file a bill against the executor of his ancestor, and, though the only person entitled, may claim to have the benefit of the conversion.

Lord Loughborough, in *Walker v. Denne* (u), appears to have doubted upon this point, and observed, that in

(s) *Wheldale v. Partridge*, 8 *of Shaftesbury*, 5 B. P. C. 144; Ves. 235. *Chaplin v. Horner*, 1 P. W. 488,

(t) See *Pulteney v. Darlington*, as to the 1350l.
1 B. C. C. 236; *Bowes v. Earl* (u) 2 Ves. jun. 175-7.

general a limitation to the right heirs of the testator was an indication that he had no will concerning it, and meant that he did not know what to do with it; but his Lordship's doctrines have, as before remarked, been repeatedly disapproved, and the very point was decided by Lord Northington in the case of *Robinson v. Knight* (x).

Lord Macclesfield advanced the position, that if a person *voluntarily and without consideration* covenanted to lay out money in a purchase of land to be settled on himself and his heirs, the Court would compel the execution of such a contract, though merely voluntary; for in all cases, where it was a measuring cast betwixt an executor and an heir, the latter should in equity have the preference (y). But the position that the heir is more favoured than the executor, though often repeated (z), does not appear to be founded on any intelligible principle. The notion may have arisen from the leaning of the Court towards the heir *in respect of lands of which the ancestor was seised*. And as to the application of the rule, that what ought to be done shall be looked upon as done, the heir in the case put by Lord Macclesfield cannot, it seems, take advantage of it; for the Court will not act upon the rule universally, but only where the agreement is founded on a good or valuable consideration (a). The opinion expressed by Lord Macclesfield may therefore justly be doubted.

If a settlement contain a power of sale, with a trust to

(x) 2 Ed. 155.

(y) *Edwards v. Countess of Warwick*, 2 P. W. 176; and see *Lechmere v. Lechmere*, Cas. t. Talb. 90, 91.

(z) See *Crabtree v. Bramble*, 3

Atk. 689; *Scudamore v. Scudamore*, Pr. Ch. 544; *Haytor v. Rod*, 1 P. W. 364.

(a) See *Crabtree v. Bramble*, 3 Atk. 687; *Frederick v. Frederick*, 1 P. W. 713.

re-invest the proceeds in a purchase to the same uses, and the lands be sold, but the proceeds be not re-invested, though the bulk of the estate sold was of gavelkind tenure, yet if one of the uses be to A. and his heirs, the proceeds of the sale will descend to the heirs of A. at common law, and not to the heirs by the custom of gavelkind (*b*).

In the preceding observations it has of course been assumed, that the direction or agreement for conversion is by the terms of the instrument made *absolute* and *imperative*; for, where a mere *option* is given, the original character of the property continues until the discretion has been exercised, and the conversion actually effected; as, if the direction or agreement be to lay out money in "lands or securities (*c*)," in "freeholds or leaseholds (*d*)," or if by any other mode of expression an intention is manifested of not converting the property at all events (*e*).

But, where the uses declared are exclusively applicable to real estate, the direction or agreement will be construed to be imperative, though the instrument contain an authority to invest the money upon securities until a purchase can be found (*f*), or, the fund being already out upon security, a power is inserted to call it in, and lay it out upon other securities (*g*), or even

(*b*) *Hougham v. Sandys*, 2 Sim. Ves. 388; *S. C.* 8 Ves. 227; and see *Abbot v. Lee*, 2 Vern. 284;

(*c*) *Curling v. May*, cited *Guidot* *Davies v. Goodhew*, 6 Sim. 585.

v. Guidot, 3 Atk. 255; *Amler v. Amler*, 3 Ves. 583; and see *Van v. Barnett*, 19 Ves. 102.

(*f*) *Edwards v. Countess of Warwick*, 2 P. W. 171; *Earlom v. Saunders*, Amb. 241.

(*d*) *Walker v. Denne*, 2 Ves. jun. 170; *Davies v. Goodhew*, 6 Sim. 585.

(*g*) *Thornton v. Hawley*, 10 Ves. 129; and see *Triquet v. Thornton*, 13 Ves. 345.

(*e*) *Wheldale v. Partridge*, 5

though the direction or agreement be to lay out the money on lands *or* securities, the intention in the last case apparently being, that the money shall be invested upon security until a suitable purchase can be found, and that the interest and dividends in the mean time shall be paid to the person who would be entitled to the rents (*h*).

And, where the uses are thus exclusively applicable to real estate, the direction or agreement will be regarded as imperative, though the settlement require the purchase to be made at the *request* of a party (*i*), for the insertion of such a clause has been taken to mean, not that a conversion may not be effected *before*, but that it shall certainly be effected *after* request (*k*). And the construction is the same, though the purchase be directed to be made with a person's *consent* and *approbation* (*l*); for upon a convenient purchase being proposed, the Court, said Sir J. Jekyll, will take upon itself to judge thereof, and, without some reasonable objection made, will order the money to be laid out in it, so that such a proviso seems to be immaterial, and as if omitted (*m*).

As money to be converted into land is considered as land, so land to be converted into money is, upon the same principle, invested with all the properties of money. Thus, if an estate be directed to be sold, and the pro-

(*h*) *Earlom v. Saunders*, Amb. 241; *Cowley v. Hartstonge*, 1 Dow, 361.

(*i*) *Thornton v. Hawley*, 10 Ves. 129.

(*k*) *Ib.* 137; but see *Stead v. Newdigate*, 2 Mer. 530.

(*l*) *Thornton v. Hawley*, *ubi supra*; in *Symons v. Rutter*, 2

Vern. 227, Hutchins was right, *per* Sir J. Jekyll, *Lechmere v. Earl of Carlisle*, 3 P. W. 220, and *per* Lord Thurlow, *Pulteney v. Darlington*, 1 B. C. C. 238; but see *Stead v. Newdigate*, 2 Mer. 530; *Davies v. Goodhew*, 6 Sim. 585.

(*m*) *Lechmere v. Earl of Carlisle*, 3 P. W. 220, *per* Sir J. Jekyll.

ceeds be made payable to A., the property, though unconverted at A.'s decease, will pass by a general bequest of all his personal estate (*n*); and, if A. die intestate, will vest in his personal representative (*o*).

But where land is to be converted into money, or money into land, the notional conversion will only subsist until some *cestui que trust*, who is competent to elect, declare his intention to take the property in its original character. The Court will not compel a conversion against the will of the absolute owner, for should the conversion be made, he would immediately reconvert it, and Equity will do nothing in vain (*p*).

Upon the subject of election we propose to consider two questions:—1. What persons are capable of electing; and 2. In what manner the act of election may be manifested.

1. Who may elect.

In respect of *personal incapacity*, an infant (*q*), lunatic (*r*), or *feme covert* (*s*), has no power to make election.

“ But although,” said Lord Hardwicke, “ a *feme covert* cannot alter the nature of money to be laid out in land by contract or deed, yet if the money be invested

(*n*) *Stead v. Newdigate*, 2 Mer. Ves. 129; *Van v. Barnett*, 19 Ves. 102; *Seeley v. Jago*, 1 P.

(*o*) *Ashby v. Palmer*, 1 Mer. W. 389; and see *Ashby v. Palmer*, 1 Mer. 301.

296; *Biggs v. Andrews*, 5 Sim. 424; *Burton v. Hodsohl*, 2 Sim. 24. (*r*) *Ashby v. Palmer*, 1 Mer. 296.

(*p*) *Seeley v. Jago*, 1 P. W. 389. (*s*) *Oldham v. Hughes*, 2 Atk.

(*q*) *Carr v. Ellison*, 2 B. C. C. 452; and see *Ashby v. Palmer*, 1 Mer. 301.

56; *Earlom v. Saunders*, Amb. 241; *Thornton v. Hawley*, 10

in land, (and sometimes sham purchases have been made for the purpose,) she may then levy a fine of the land, and give it to her husband or any body else. There is a way also of doing this without laying the money out in land, and that is, by coming into a court of equity, and consenting to take the money as personal estate ; for upon her being present in Court, and being examined as a *feme covert* upon a fine is, her consent binds the money articulated to be laid out in land as much as a fine at law would the land, and she may dispose of it to the husband or any body else. And the reason of it is this—that at law money so articulated to be laid out in land is considered barely as money till an actual investiture, and the equity of this Court alone views it in the light of real estate ; and, therefore, this Court can act upon its own creature, and do what a fine at common law can upon land (t)."

A *remainder-man* may elect as between himself and the trustees, but not as between himself and the owner of the prior estate. Thus in *Lingen v. Sowray* (u) A., on his marriage, agreed to add 700*l.* to the lady's portion of 700*l.*, and the securities for both sums were assigned to trustees, and the money was directed to be laid out in lands to be settled to the use of the husband for life, remainder to the wife for life, remainder to the first and other sons in tail, remainder to the right heirs of the husband. There was no issue of the marriage, and 250*l.* of the trust money was called in by the direction of the husband, and placed out upon other securities, and a

(t) *Oldham v. Hughes*, 2 Atk. 223 ; *Crabtree v. Bramble*, 3 Atk. 453. 680 ; *Triquet v. Thornton*, 13

(u) 1 P. W. 172 ; and see *Pul- Ves. 345 ; Stead v. Newdigate*, 2
teney v. Darlington, 1 B. C. C. Mer. 531.

trust declared, not for the husband and his heirs, but for the husband, his executors and administrators. The husband afterwards died, having devised part of his real estate to his wife, and the residue to J.S., and having bequeathed his personal estate and all his securities for money to his wife. It was debated whether the 250*l.* ought, as to the operation of the husband's will, to be regarded in the light of realty or personalty. Lord Harcourt said, "As to the 250*l.* which was called in by the testator, and afterwards placed out on securities on a different trust, that shall be taken to be personal estate, forasmuch as, there being no issue of the marriage, it was in the power of the husband to alter and dispose of it as against the heir at law, though not as against his wife."

Where an estate is directed to be sold, the proceeds to be divided amongst several persons, no one singly has a right to elect that his own undivided share shall not be disposed of (*x*), for the other undivided shares will not sell so beneficially in proportion as if the estate were entire (*y*); but if money be directed to be laid out in lands to be settled on A., B., and C., as tenants in common, any one of them may elect to take his own third as money, for two-thirds may be invested just as advantageously as the whole sum (*z*).

It may be thought, perhaps, that a *tenant in tail* of lands to be purchased cannot elect, because the interests of the issue and the remainder-man, who both take by title

(*x*) *Fletcher v. Ashburner*, 1 B. C. C. 500, *per* Sir T. Sewell; *Deeth v. Hale*, 2 Moll. 317; and see *Smith v. Claxton*, 4 Mad. 494.

(*y*) *Chalmer v. Bradley*, 1 J. & W. 59.

(*z*) *Seeley v. Jago*, 1 P. W. 389; *Walker v. Denne*, 2 Ves. jun. 182, *per* Lord Loughborough.

paramount, would otherwise be prejudiced. But the old rule appears to have been, that tenant in tail might in *every case* have elected, and on filing a bill would have been entitled to the money (a); and the principle upon which the practice was grounded was, that equity will do nothing in vain, and it were nugatory to direct an actual purchase and settlement, when the tenant in tail the next moment might dispose of the fee simple. Lord Cowper, in the case of *Colwal v. Shadwell* (b), took the distinction, that where the remainder in fee was not vested in the tenant in tail himself, but was limited over to a stranger, there, as the absolute fee could only be acquired by a *recovery*, which was a thing of time, and could not be suffered in vacation, the remainder-man should not lose his chance; and, as in that case the tenant in tail did actually die before the recovery was suffered, it shewed the remainder-man's interest in so glaring a light, that it established the precedent ever afterwards (c). Of course the money would still have been decreed to the tenant in tail, provided the remainder-man had waived his right and consented to the payment (d).

In *Eyre's case* (e) Lord Chancellor King was for extending the same protection to the issue. "I cannot see," he said, "why I should not have the like regard to the issue in tail as for the remainder-man. It is possible the tenant in tail, before he can light on a purchase and settle it, may die, leaving issue, and this is a chance of which I would not deprive such issue." And in *Speaker Onslow's*

(a) *Cunningham v. Moody*, 1 Ves. 176; *Talbot v. Whitfield*, 1 Ves. 176, *per* Lord Hardwicke. Bunb. 204.

(b) Cited *Chaplin v. Horner*, 1 P. W. 485. (d) See *Trafford v. Boehm*, 3 Atk. 440.

(c) See *Cunningham v. Moody*, (e) 3 P. W. 13.

case (f) he declared his adherence to the same opinion, observing, that "the levying of a fine also was a thing of time, there being several offices to pass, and the writ of covenant to be under the Great Seal." But the rule, which had been uniformly acted upon before his time (g), appears, notwithstanding his Lordship's authority, to have been revived by his successors (h).

And the election of the tenant in tail need not necessarily be made in a suit, but may be expressed by act *in pais*, as if tenant in tail with remainder to himself receive the money of the trustee, or if tenant in tail with remainder to a stranger receive it of the trustee with the consent of the remainder-man. Upon this subject Lord Hardwicke observed, "The Court *pursues* the rights of parties, and whatever a court of common law does by a judgment, or Chancery by a decree, is in affirmance of those rights, and does not give them a right which they had not before (i). Why does the Court decree the money? Because the parties are entitled to it. There is, therefore, no occasion for a decree of the Court to destroy the real quality of the money, unless there be an incapacity of the person, as in the case of a *feme covert*, who must first be examined (k)."

Lord Thurlow, indeed, once said, "If the fund be outstanding in trustees, and it be necessary to come hither

(f) *Ib.* 14, note (G).

(g) *Benson v. Benson*, 1 P. W. 130; *Short v. Wood*, *Ib.* 470; *Edwards v. Countess of Warwick*, 2 P. W. 173, admitted.

(h) *Trafford v. Boehm*, 3 Atk. 447, *per* Lord Hardwicke; *Cunningham v. Moody*, 1 Ves. 176, *per*

eundem; *Holderness v. Carmarthen*, 1 B. C. C. 382, *per* Lord Thurlow.

(i) And see *Earl of Bath v. Earl of Bradford*, 2 Ves. 590.

(k) *Trafford v. Boehm*, 3 Atk. 448; but see *Pearson v. Lane*, 17 Ves. 106.

in order to obtain it, the money, when obtained, will be personal property; and so it would also, if the trustees pay it without suit. That is, supposing the estate, when purchased, would be a fee simple, for *it would be otherwise in case of its being an estate tail (l).*" But the concluding remark must, as Mr. Serjeant Hill, in a note on the passage, has observed (*m*), be taken to apply, not to every tenant in tail, as not to tenant in tail with remainder to himself in fee, but only to tenant in tail with remainder to a stranger; for, in a subsequent case, where the tenant in tail had executed an assignment of two sums of money directed to be laid out in lands, his Lordship said, "As to the 500*l.* the assignor was tenant in tail, remainder to a stranger, remainder to himself in fee: as to the 1,000*l.* he was tenant in tail, with remainder in fee to himself. I am clear, that in regard to the 1,000*l.* he had the absolute dominion over it, having the immediate remainder in fee; but, as to the 500*l.*, I am equally clear the other way, because of the intermediate remainder (*n*)."

Now, by the Fines and Recoveries Act (*o*), a tenant in tail may, with the consent of the protector, if any, dispose absolutely of the lands entailed *at any time whether in term or vacation*. It would seem to follow, that at the present day not only tenant in tail with immediate remainder to himself in fee, but also tenant in tail with remainder over to a stranger, may elect to take the money in its original character without the circuity of a settlement, and of course may declare such election either

(*l*) *Pulteney v. Darlington*, 1 B. C. C. 236.

(*m*) *Ib.* note (*a*), Lord Henley's ed.

(*n*) *Holderness v. Carmarthen*, 1 B. C. C. 382.

(*o*) 3 & 4 W. 4, c. 74.

by the institution of a suit, or by act *in pais*. The 71st section of the statute (*p*) enacts, that "money to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall be treated as the lands to be purchased, and the previous clauses of the Act shall apply to such money, as if it were directed to be laid out in the purchase of *freehold* lands, and such lands were actually purchased and settled." By virtue of this clause the tenant in tail may at any time defeat his issue and the remainder-men by a deed executed with the formalities required by the Act; but what is there to prevent the tenant in tail from exercising a power founded upon principles independent of the statute, and acquiring the fee simple by the mere act of election (*q*)? It may possibly be thought, that the old rule, which made election a bar to the issue, might have been grounded on this—that, because no fine or recovery could have been levied or suffered of money (*r*), the Court, therefore, held election to have the effect of a bar, that the tenant in tail might not lose the power, which the law gave him, of defeating the settlement, but that, since by the Fines and Recoveries Act a tenant in tail of money is enabled to bar his issue and the remainderman by the same formalities as if the lands were actually purchased and settled, the same indulgence ought not now to be shewn. But the answer to this reasoning is, that the tenant in tail was allowed to elect, not because the tenant in tail of money had a right

(*p*) The preceding section repeals the 39 & 40 G. 3, c. 56, and 7 G. 4, c. 45.

(*q*) But see *Henley v. Webb*, 5 Mad. 407.

(*r*) See *Benson v. Benson*, 1 P. W. 130; *Edwards v. Countess of Warwick*, 2 P. W. 174; *Maynwaring v. Maynwaring*, 3 Atk. 413.

to exercise the same powers of ownership as a tenant in tail of lands, but for the purpose of avoiding circuitry. Had the former been the principle, the tenant in tail might equally have barred the remainder-man as the issue; but for the destruction of remainders an actual settlement was necessary, and a sham purchase was often resorted to for the purpose (*s*).

2. It remains to add a few observations as to the *manner* in which a person may elect.

The act of election may either be *presumed* by the Court, or may be *expressly declared*.

The *presumption*, it seems, will arise on very slight circumstances (*t*): it will be sufficient, where land is to be converted into money, if the *cestui que trust* keep the estate for a length of time unsold (*u*) (but in one case a period of two years was considered not to be a sufficient indication of intention (*x*)), or, where money is to be turned into land, if the *cestui que trust* receive the money from the trustee (*y*).

It was determined by Lord Harcourt that a *cestui que trust* had divested money of its real quality by causing the securities to be changed, and the trust to be declared to himself *and his executors*, for this, he observed, was tantamount to saying the money should *not* go to the heir (*x*);

(*s*) See — v. *Marsh*, cited *Chaplin v. Horner*, 1 P. W. 485, note (†); *Maynwaring v. Maynwaring*, 3 Atk. 413; *Henley v. Webb*, 5 Mad. 407.

(*t*) See *Pulteney v. Darlington*, 1 B. C. C. 238; *Van v. Barnett*, 19 Ves. 109; *Bradish v. Gee*, Amb. 229.

(*u*) See *Ashby v. Palmer*, 1 Mer. 301.

(*x*) *Kirkman v. Miles*, 13 Ves. 338; but see *Crabtree v. Bramble*, 3 Atk. 688; *Inwood v. Twyne*, 2 Ed. 148.

(*y*) *Pulteney v. Lord Darlington*, 1 B. C. C. 238, *per* Lord Thurlow; *Trafford v. Boehm*, 3 Atk. 440; and see *Rook v. Worth*, 1 Ves. 461.

(*z*) *Lingen v. Sowray*, 1 P. W. 172.

and, *vice versâ*, where land was to be converted into money, it was held by Lord Hardwicke, that a lease by the *cestui que trust*, reserving a rent to her heirs and assigns, was evidence of an intention to continue the property as real estate (a).

A person may *express* his election even by parol. This at least was the opinion of Lord Macclesfield (b), and apparently was actually decided in the case of *Chaloner v. Butcher* (c), in which, the husband having *declared* the money should not be laid out in land, the Court held, that, if the question concerned the right of a third person, the declarations of the husband ought not to be admitted, but, as it was between his personal and real representative, they should be read. And both Lord Thurlow (d), and Lord Eldon (e), seem to lend their sanction to the same doctrine. An *obiter dictum* of Lord Hardwicke to the contrary (f), though supported by so illustrious a name, must therefore be considered as overruled.

Where money bears the notional impress of realty, the testator may bequeath it as so much money to be laid out in land, and the money will pass, though the will be not attested according to the Statute of Frauds (g): the will operates first by way of election, and then by way of bequest.

(a) *Crabtree v. Bramble*, 3 Atk. 680, see 688, 689.

(b) *Edwards v. Countess of Warwick*, 2 P. W. 174.

(c) Cited *Crabtree v. Bramble*, 3 Atk. 685.

(d) *Pulleney v. Darlington*, 1 B. C. C. 237.

(e) *Wheldale v. Partridge*, 8 Ves. 236.

(f) *Bradish v. Gee*, Amb. 229.

(g) See the cases cited *Lechmere v. Earl of Carlisle*, 3 P. W. 221, note (C); and see *Pulleney v. Darlington*, 1 B. C. C. 235, 236.

II. The act of the trustee shall not alter the nature of the *cestui que trust's* estate.

At law the trustee is the absolute proprietor of the land or fund, and therefore may exercise any control or dominion over it—may convert realty into personalty, or personalty into realty; but *equity*, which regards a trustee in the light of a mere nominal instrument, will not permit the interest of the *cestui que trust* to be affected by any act of misconduct, but, as often as any wrongful conversion is made, will transfer to the new interest the quality and character of the old—will treat real estate as personal, and personal as real, as the circumstances of the case may require.

Where the *cestui que trust* is *sui juris*, every change in the nature of the property made without the authority of the beneficial owner must be considered a misfeasance; but with respect to *lunacy* and *infancy* it is necessary some distinctions should be taken.

It has been laid down as the general rule in *lunacy*, that the Court will not alter the condition of the lunatic's property to the prejudice of his successors; but the maxim must be received with the qualification, *except it be for the benefit of the lunatic himself* (h). The Chancellor takes the advice and assistance of the presumptive next of kin and presumptive heir at law in the care and management of the property (i); but through all the cases runs this prevailing principle—that the object of attention is exclusively and entirely the interest of the lunatic, without any regard to those who may have eventual rights of succession (k).

(h) *Ex parte Grimstone*, cited 123, per Lord Eldon.
Oxenden v. Lord Compton, 4 B. C. (k) *Oxenden v. Lord Compton*,
 C. 235, note, per Lord Apsley. 2 Ves. jun. 72, and S. C. 4 B. C. C.
 (i) *Ex parte Phillips*, 19 Ves. 283, per Lord Thurlow; and see

“ Nothing,” said Lord Loughborough, “ would be more dangerous or mischievous than for the Court to consider how it would affect the representatives : there would always be among them an emulation of each other, and their speculations, if the administrator were to engage in them, would mislead his attention, and confine his observation as to the interest of the only person he is bound to protect : there would be a continued running account between the personal and real estates : the Chancellor would be perpetually looking to the right or left, and the interest of the lunatic would be committed in favour of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events (l).”

Upon this principle, where a lunatic was seised *ex parte paternâ* of estate A., and *ex parte maternâ* of estate B., and the latter was subject to a mortgage, the money arising from a fall of timber upon A. was directed to be applied in discharge of the mortgage upon B. ; and upon a question between the respective heirs it was held, that the representative who succeeded to A. was not entitled to any recompence from the representative who inherited B. (m).

So if the lunatic be considerably indebted, and it appears his maintenance would be better provided for, and his advantage promoted, by the sale of a real estate inconvenient and ill-conditioned, instead of exhausting

ex parte Bromfield, 1 Ves. jun. 462; *ex parte Grimstone*, Amb. 708; *S. C.* cited 2 Ves. jun. 75, note (x), and 4 B.C.C. 235, note; *ex parte Phillips*, 19 Ves. 123; *Dormer's case*, 2 P.W. 265; *ex parte Chumley*, 1 Ves. jun. 297; *ex parte Baker*, 6 Ves. 8. ' (l) *Ozenden v. Lord Compton*, 2 Ves. jun. 72, 73; *S. C.* 4 B. C. C. 233, 234. (m) *Ex parte Phillips*, 19 Ves. 123, per Lord Eldon.

the personalty, the Court, on a proper representation of the case, would have no difficulty in making an order to that effect (*n*).

So, timber which ought to be cut on a lunatic's estate may be felled by the direction of the Court, and the proceeds may either be applied to the redemption of the land tax, or payment of debts (*o*), or any other purpose which the true interest of the lunatic may require; or if not wanted for *any* particular purpose, will go to the next of kin as personalty, and not to the heir as part of the realty (*p*).

Where the lands of the lunatic are in mortgage, and that whether they have descended to him subject to the charge (*q*), or the debt is the lunatic's own (*r*), the Chancellor, not *ex necessitate*, but feeling it to be prudent when the personal estate can afford to disincumber the real estate (*s*), will order the requisite sum to be applied; and the next of kin after the lunatic's decease will have no *lien* upon the real estate for the amount expended.

So, if it be necessary for the interest of the real estate to bring an action of trespass, resort may be had to the

(*n*) *Ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon.

(*o*) *Ex parte Phillips*, 19 Ves. 119; *Bevan's case*, cited *ex parte Bromfield*, 1 Ves. jun. 455, 457.

(*p*) *Ex parte Bromfield*, 1 Ves. jun. 453; *S. C.* 3 B. C. C. 510; *Oxenden v. Compton*, 2 Ves. jun. 69; *S. C.* 4 B. C. C. 231; *Shelly's case*, cited 1 Ves. jun. 457; *ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon. The *dictum* in *Marquis of Anandale v. Marchioness*

of *Anandale*, 2 Ves. 384, must be considered as overruled.

(*q*) *Dennis v. Badd*, cited *Wimchelsea v. Norcliffe*, 1 Vern. 436; but see *Weld v. Tew*, Beat. 266.

(*r*) *Ex parte Grimstone*, Amb. 706; *S. C.*, cited *Oxenden v. Lord Compton*, 4 B. C. C. 234; *Dormer's case*, 2 P. W. 262.

(*s*) *Oxenden v. Lord Compton*, 2 Ves. jun. 74, *per* Lord Thurlow.

lunatic's personal fund (*t*). And by the same rule the money of the lunatic may be laid out in improvements (*u*); but here the Chancellor must act *tanquam bonus paterfamilias*, taking every opportunity of ameliorating the estate by fair and ordinary means, such as draining, inclosures, &c. (*x*), erecting a fire-engine for the purpose of working a coal-mine (*y*), but must not engage in risks and dangerous adventures (*z*). And of course the personality may be drawn upon for *necessary expenses*, as repairs (*a*), fines for renewals of leases, or admissions to copyholds (*b*). But where the committees of a lunatic, who were entitled to the estate themselves after his death, laid out a sum in *purchasing* timber for repairs, when they ought to have cut timber on the estate, Lord Hardwicke said, that, having done so merely to serve their own interest, they should make good the disbursement to the lunatic's next of kin (*c*).

In the preceding cases the conversion has been for the clear benefit of the lunatic, but in general the Court will not lightly change the condition of the property, but will

(*t*) *Oxenden v. Lord Compton*, 2 Ves. jun. 72, *per* Lord Loughborough.

(*u*) *Sergeson v. Sealey*, 2 Atk. 414, *per* Lord Hardwicke; *Dormer's case*, 2 P. W. 262.

(*x*) See Justice De Grey's argument in *ex parte Grimstone*, cited *Oxenden v. Lord Compton*, 2 Ves. jun. 75, note (*x*).

(*y*) *Oxenden v. Lord Compton*, 2 Ves. jun. 73.

(*z*) *Oxenden v. Lord Compton*, 2 Ves. jun. 73. *per* Lord Loughborough.

(*a*) *Sergeson v. Sealey*, 2 Atk. 414, *per* Lord Hardwicke; *ex parte Grimstone*, Amb. 708; *S.C.* cited *Oxenden v. Lord Compton*, 4 B. C. C. 237, note, *per* Lord Apsley; 2 Ves. jun. 72, *per* Lord Loughborough; *Newport's case*, cited *Ib.*

(*b*) Justice De Grey's argument in *ex parte Grimstone*, *ubi supra*; but see *Degg's case*, cited *Oxenden v. Lord Compton*, 4 B. C. C. 235, note.

(*c*) *Ex parte Ludlow*, 2 Atk. 407.

only act on pressing and urgent occasions (*d*): it will interfere with great caution, and do nothing that is unnecessary or uncalled for (*e*). The Court will not *buy and sell* for the lunatic (*f*); and, therefore, if the committee of the lunatic wantonly, and of his own head, lay out money upon land, or turn land into money, the Court will not suffer such fraudulent management to affect the rights of the representatives (*g*), but will transfer to the heir what ought to have remained real estate, and to the next of kin what ought to have remained personal estate (*h*). However, if timber be cut down, not by a committee in breach of his duty, but by a stranger tortiously, then, as there is no abuse of confidence, the heir has no equity, and the property of the timber, like a windfall, will belong to the executor (*i*).

Next, as to *infants*.

In *ex parte Bromfield* Lord Thurlow, without having examined the authorities, said, he could not distinguish between lunatics and infants (*k*); but, when the cause came on again, and he had maturely considered the subject, he never once hinted at the existence of such a doc-

(*d*) *Ex parte Bromfield*, 1 Ves. jun. 463, and 3 B. C. C. 515, *per* Lord Thurlow.

(*e*) *Oxenden v. Lord Compton*, 2 Ves. jun. 76, and 4 B. C. C. 238, *per* Lord Loughborough.

(*f*) *Oxenden v. Lord Compton*, 2 Ves. jun. 73, *per* Lord Loughborough; *ex parte Grimstone*, cited in *Oxenden v. Lord Compton*, 4 B. C. C. 235, note, *per* Lord Apsley; *Sergeson v. Sealey*, 2 Atk. 414, *per* Lord Hardwicke.

(*g*) See *ex parte Bromfield*, 1 Ves. jun. 462.

(*h*) *Anon. case*, 2 Freem. 114; *Awdley v. Awdley*, 2 Vern. 192; *Marquis of Anandale v. Marchioness of Anandale*, 2 Ves. 384, *per* Lord Hardwicke.

(*i*) *Anon. case*, cited *ex parte Bromfield*, 1 Ves. jun. 462, and 3 B. C. C. 515, *per* Lord Thurlow.

(*k*) 1 Ves. jun. 461; *S. C.* 3 B. C. C. 515.

trine (*l*); and, indeed, there is a very broad distinction between the two cases; for, should a *lunatic* recover, which in contemplation of law is always possible, he has precisely the same power of disposition, though by different modes, over one species of property, as over the other (*m*); but an *infant*, while he can bequeath a chattel at the age of fourteen, can only devise a freehold when he has attained twenty-one (*n*). The Court therefore will not allow an infant's estate to be converted from one species of property into another, not from any tenderness to the rights of the representatives, but from a regard to the circumstances and capacity of the infant himself. Should his money be turned into land, he would lose a power of disposition which the law permits him to exercise: should land be turned into money, he would indirectly gain a power which the policy of the law has forbidden him.

In *The Earl of Winchelsea v. Norcliffe* (*o*) Sir J. Trevor, M. R., said, in case the trustees had come to the Court, and shewn how it would be for the benefit of the infant to have the money laid out on land, he doubted not the Court would have decreed it; and Lord Jeffries agreed, that, had the trustees obtained an order for making the purchase, the Court would in that case have maintained its own decree; and Lord Cowper once observed, that purchases made in infants' names for their benefit might be good enough (*p*). Lord Northington expressed him-

(*l*) *Oxenden v. Lord Compton*, 2 Ves. jun. 69; *S. C.* 4 B. C. C. 231. *Norcliffe*, 1 Vern. 437, in which case the distinction appears first to have been noticed.

(*m*) See *ex parte Phillips*, 19 Ves. 123. (*o*) 1 Vern. 435.

(*p*) *Terry v. Terry*, Pr. Ch.

(*n*) See *Earl of Winchelsea v.* 274. The decision in this case

self to the same effect, for "It is stated," he said, "to be a general rule in equity, that no person or means can convert an infant's personal estate into real, or *vice versâ*, so as to bind such infant. This is a point of very great consequence, and, if there be any such general rule, it ought to be adhered to; but the rule is quite otherwise, and reason as well as practice are in direct opposition to it; and, indeed, it is absolutely necessary that it should be so. First, as to *trustees and guardians of their fortunes*, I can conceive many cases where a conversion might be made by them, and that this Court would support and approve their conduct, and it would be strange to say that trustees would be censured in this Court for doing what this Court would have ordered to be done. Next, I am very sure it is a power which *this Court* has often exercised, and which I have in substance executed, without any provision to retain the former quality, and without any dispute upon it. Indeed, it seems to be admitted, that in both cases, *if for the benefit of the infant*, it may be done (q)." And his Lordship determined the case partly upon this ground, though the infant's confirmation, after he had come of age, was in itself a decisive circumstance. In *ex parte Bromfield* (r) Lord Thurlow said he approved of these principles of Lord Northington, but he was there addressing himself particularly to the case of a lunatic.

On the other hand, in *Witter v. Witter* (s) an executor, possessed of a chattel lease, determinable on lives,

was justified by the special power in the will, "that the executors should do as they should think would be most for the infant's advantage." (q) *Inwood v. Twyner*, 2 Ed. 152.
 (r) 1 Ves. jun. 461.
 (s) 3 P. W. 99.

in trust for an infant, took on the renewal a *freehold* lease for lives in the name of a trustee, in trust for the infant and his heirs. There was some slight evidence that the lessor had refused to renew unless a freehold lease were accepted. Lord King said, "If the fact had been (which has not been fully proved), that the lessor would not have made any other than a freehold lease, this might and ought to have been declared in trust for the benefit of the executor and administrator of the infant, if he should die during his infancy. Now, though this trust be not *declared*, yet it is in equity *implied*, since the renewed lease, though for lives, comes in the place and stead of the original lease, which was for years;" and his Lordship determined the case in accordance with this view.

The opinion of Lord Hardwicke was clearly and decisively given on the same side on more than one occasion (†); and the doctrine is further supported, or rather must be considered as perfectly established, by the great authority of Lord Eldon. "The Court," he observed, "is in the habit of saying, a due administration requires them not to change the nature of the property as between the representatives. I have uniformly made it a rule, since I have sat here, when property of one nature has been applied for the benefit of an infant to property of another, to have an express provision, that if he shall not attain the age at which he will have a disposable power, the representative shall not be prejudiced in any degree by the act, done by the Court in contemplation of the infant's benefit, in all the circumstances surprise or

(†) *Sergeson v. Sealey*, 2 Atk. 413; *Rook v. Worth*, 1 Ves. 461.

accident can throw around it (*u*). It is said, this is the effect of the Court's declaration, but if the Court forgets to make such a declaration, the same rule does not obtain; but that is not correct, for the declaration is made *because that is the law applicable to the case of the infant. It does not create the right, but is a declaration of a pre-existing right to have the property so secured (x).*" And many years afterwards his Lordship expressed himself in the same decisive manner:—"In the case of the infant," he said, "it is *settled*, that as a trustee out of court cannot change the nature of the property, so the Court, which is only a trustee, must act as the trustee out of court (*y*)."

Upon the same principle, if timber be cut on an infant's estate, the proceeds, and, it seems, the accumulation of the proceeds (*z*), will continue part of the realty, and descend to the heir (*a*). But a distinction was taken in *Mason v. Mason* (*b*), and Sir Thomas Clarke said he allowed it (*c*), between the case of an infant tenant in fee and an infant tenant in tail: that in the former case, the proceeds of the timber should be taken as realty, inasmuch as the infant was thus at all events absolutely entitled; but in the latter case, as the proceeds might,

(*u*) And see *ex parte Phillips*, 19 Ves. 123; *Ashburton v. Ashburton*, 6 Ves. 6; *Sergeson v. Sealey*, 2 Atk. 413; *Lord Leigh's case*, and *Lord Plymouth's case*, cited *Inwood v. Twyner*, 2 Ed. 151.

(*x*) *Ware v. Polhill*, 11 Ves. 278.

(*y*) *Ex parte Phillips*, 19 Ves. 122.

(*z*) See *ex parte Bromfield*, 1

Ves. jun. 454.

(*a*) *Tullet v. Tullet*, 1 Dick. 322; *S. C.* Amb. 370; *Mason v. Mason*, cited *Id.* 371; *ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon; and see *Rook v. Worth*, 1 Ves. 461; but see *ex parte Bromfield*, 3 B. C. C. 516.

(*b*) *Ubi supra*.

(*c*) *Tullet v. Tullet*, Amb. 371.

if impressed with the character of realty, become vested in the remainder-man, the Court would treat the fund as personalty, and give it to the infant's executors.

Again, if an infant's money be applied to pay off a charge, or redeem a mortgage affecting his real estate, it seems the better opinion, (though some old authorities are against it,) that the sum so invested shall still be looked upon as part of the personalty (*d*). But *necessary expenses*, though affecting the infant's *lands*, are allowed to be thrown upon the personal fund, as disbursements for repairs (*e*), for keeping up a house, &c. (*f*)

So in *Vernon v. Vernon* (*g*), where an estate was devised to an infant in consideration of his paying the sum which the original purchase had cost, it was held, that the amount, being a *necessary* outlay, had properly fallen upon the personalty, and the next of kin were not entitled to compensation.

There may be cases to which the reason for preserving the original character of the property does not apply. Thus, if an infant be seised of a lease for lives *ex parte maternâ*, and the guardian take a new lease to the infant and his heirs, the substituted lease will not descend in the maternal line, but, as a new acquisition,

- (*d*) *Ex parte Bromfield*, 3 B. Norcliffe, 1 Vern. 436.
 C. C. 516, *per* Lord Thurlow; (*e*) *Ex parte Grimstone*, cited
Tullet v. Tullet, 1 Dick. 323, *per* Oxenden *v. Lord Compton*, 4
 Sir T. Clarke; but see 2 Freem. B. C. C. 235, note, *per* Lord Aps-
 114, c. 126; *ex parte Grimstone*, ley.
 Amb. 708; *Palmer v. Danby*, Pr. (*f*) *Ex parte Grimstone*, Amb.
 Ch. 137; *Zoach v. Lloyd*, cited 708, *per eundem*.
Awdley v. Awdley, 2 Vern. 192; (*g*) Cited in *ex parte Bromfield*,
 as to *Dennis v. Badd*, cited Ib. 1 Ves. jun. 456.
 193, see *Earl of Winchelsea v.*

will go to the heirs on the part of the father (*h*). It being perfectly immaterial to the infant himself whether the *seisin* be in the paternal or maternal line, the representative *ex parte maternâ* has no equity against the representative *ex parte paternâ*.

(*h*) *Mason v. Day*, Pr. Ch. 319; *Pierson v. Shore*, 1 Atk. 480.

APPENDIX.

No. I.

Strode v. Winchester. Supra, p. 38.

THE following is a brief note of the case from the Registrar's Book :—

Ferdinando John Paris, being desirous of leaving his fortune to Lucy Naomi Strode, but without the knowledge of her husband, who had married her against the wishes of the testator, fixed upon Elizabeth Gough, the mother of the said Mrs. Strode, to be the sole trustee, and *acquainted her therewith, and received a solemn promise from her*, that she would take care of every thing for the separate use of her daughter. Paris, by his will, gave all his real and personal estate to Mrs. Gough, and made her sole executrix; and by a paper writing, which bore even date with and accompanied the will, he addressed Mrs. Gough as follows:—"I have given you the whole of what I have in the world, and I wish I had more to give in the same way. You know the unhappy reason why I could not leave you a partner in the donation, but I greatly trust you will answer my often declared design and intention, and therefore would not fetter you with any trust, nor with any co-executor; and I beg you to answer my purpose most effectually, in full opinion whereof I have made my will in this manner, relying on your fidelity therein. One of my motives to this disposition is, the promise I made to my late wife in her last moments, to take the best care I could of you and yours. I have other motives also, from your own great care and trouble taken for me; and, lastly, the great and true regard which I have for yourself and that dear girl, who was my wife's favourite. Do not disappoint my expectation of you." A mass of evidence was read relative to the intentions of the testator, and the conduct and the declarations of Mrs. Gough, and the Court decreed, "that by virtue of the last will of the testator, and the letter accompanying the will, and the *evidence in the cause*, the devisee was and ought to be deemed a trustee of the real and personal estate, for

the separate use and benefit of Mrs. Strode, after the death of Mrs. Gough."—*Reg. Lib.* 1766, B. fol. 515.

No. II.

Cogan v. Stephens. Supra, p. 188.

November 24th, 1836.

Sir Christopher C. Pepys, Master of the Rolls.—“This case involves a question of great and general importance, and of principles which might be supposed to be of very general application; and so it would appear to be from the circumstance of several cases having come before me since the argument of the cause, involving the same question; and yet it appears I am called on to give the first judicial opinion on the subject. The question is simply, whether, when a testator directs money to be invested in land for certain purposes, some of which are lawful and take effect, but others fail and become void, the property so given, after satisfying the lawful purposes, belongs to the next of kin or to the heir of the testator. The testator, Lewis Stephens, by his will, dated at Lisbon, 11th July, 1789, after describing himself as a native of Exeter, and enumerating the particulars of his property, which he stated to amount to 100,000*l.* sterling, proceeds thus:—‘As to the disposal of those worldly goods which I leave behind me, my order is, that after my funeral expenses are paid, and all my just debts, and 24,000 milreis to my dearly beloved wife, Mary Bryanna Bulkely, now Stephens, that the sum of 30,000*l.* sterling be laid out immediately by my executors hereunder mentioned, in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which shall belong to my widow during her natural life. And after her decease the said income shall belong to my dear brother William, or his children lawfully begotten; and if he dies without children, the said income shall belong to my brother Jedidiah and his children lawfully begotten; and if he dies without issue, then this income shall belong to my brother John James and his children lawfully begotten; and if he dies without children, then this income shall belong to my dear sister Philadelphia and her children lawfully begotten; and if she dies without children, then the income of this estate or estates, which shall be purchased and always run in my name, shall be employed in the establishment of a charity school for boys in the city of Exeter, for the purpose of teaching them to read, write, and cypher, and foreign languages, which boys shall be natives of the counties of Devonshire or Cornwall. And I hereby order my executors to purchase this estate or estates in my name, and register the same, and this my determination, in proper places, that the Chamber of Exeter may take charge thereof in default of the regular suc-

cession above mentioned, and erect the school as hereby directed, which school shall be called Stephens's Charity School; and the regulations for its establishment I leave to the said Chamber of Exeter, and my consins Charles and Joseph Lyne, if they survive, with orders to set immediately about this useful establishment.' He then gave certain pecuniary legacies, and the residue of his fortune he gave and bequeathed in the following manner, dividing the same into fifteen parts. He gave three-fifteenths to his brother William, three-fifteenths to Jedidiah, three-fifteenths to John James, three-fifteenths to Philadelphia, two-fifteenths to his cousin Charles Lyne, and one-fifteenth to Joseph Lyne. Then after the above-mentioned disposition was made, they were to receive and divide as the money came in, as his affairs went on liquidating; and he nominated his executors, his brothers William and Jedidiah, and his cousin Charles Lyne, or in default of either of his said brothers, he nominated his brother John James, and in default of his cousin Charles Lyne, he nominated his cousin Joseph Lyne; and he declared that what he left should be divided out in full, as it was liquidated; and if any of the executors refused taking charge of the executorship, his share should be forfeited to the benefit of the others; that if any of his brothers or sisters should die before him, or either of his two consins should die before him, that then the share of the deceased should be divided among the remaining five heirs of the residue. The will was proved by Jedidiah Stephens in 1795, by John James Stephens in 1826, and afterwards by Charles Lyne, who took the name of Stephens, and is now the personal representative of the testator. The 30,000*l.* never was laid out in the purchase of land: it was invested in the public funds, and now consists of 30,996*l.* in the four per cents., of which fund the testator's widow received the dividends until her death, which took place in 1827, before which fact all the devisees had died without issue, William in 1803, Jedidiah the same year, Philadelphia in 1824, and John James in 1826, so that upon the death of the tenant for life, all the limitations as to the estate to be purchased by the 30,000*l.* prior to the direction of establishing the school at Exeter have failed, and the question is, who is now entitled to the 30,000*l.*—the plaintiff, who, on the reference made at the hearing of the cause, is found to be the heir, or the defendant, who claims it as part of the personal estate of the testator in the event which has happened? Upon *principle*, and upon analogy to several well-established rules in equity, it would appear that there is no doubt as to the proper solution of this question. The only difficulty arises from some few *cases*, or *dicta* of the Judges, which it is impossible to reconcile with these principles or these rules; and some of the cases proceed from authority so high, that, if not absolutely binding on the Court, they ought at least to make it extremely cautious in pronouncing any

judgment inconsistent with them. If a testator devises land for purposes altogether illegal, or which altogether fail, the heir-at-law takes it as undisposed of. If a testator gives personal property for purposes altogether illegal, or which altogether fail, the next of kin takes it, as in the case of an intestacy, as undisposed of. If a testator devises lands for purposes which are in part illegal, or which partially fail, or which require part only of the lands devised, the heir takes so much of the land as is undisposed of, and which was destined for the purpose, which by law cannot, or in fact does not, take effect, and so much as is not required for the purposes of the will; and this whether the land be actually sold or not. But here, it is said, the analogy between the cases of land and money ceases, and that if a testator directs money to be laid out in the purchase of land for purposes which are partly illegal, or which partially fail, the next of kin has no such interest in the money, as cannot be applied to the purposes of the will; but if there are purposes legal and feasible which require the investment, the next of kin are excluded. And why are they to be so excluded? The proposition assumes the property in question, that is, a portion of the interest in the property, is not disposed of by the will, and the law gives to the next of kin all the personalty not disposed of. Is it from any incapacity in the next of kin to take property which exists in the form of land? That cannot be. In equity money may be considered as land, or land as money, according to circumstances. A man who has agreed to sell his land, and dies intestate, dies seised of the land—his property exists as land—it descends as land to the heir. The next of kin, so far from being incapable of succeeding to property that exists in the form of land, are entitled to the purchase money to be paid in lieu of the land so contracted to be sold. So it is with respect to mortgages in fee, of which the mortgagee dies seised, so that it cannot be that his next of kin are to be excluded, because the property exists in the form of land. But if there be this difficulty in stating why the next of kin are to be excluded, there is at least as much difficulty in shewing how the heir at law may be entitled, as regards the personalty. The proposition assumes the property was personalty of the testator at the moment of his death, and there was no *scisin* in him of any thing of an inheritable quality. Can the heir, as such, inherit what never was inheritable? Can he take from the ancestor what the ancestor never had? It cannot be necessary to pursue this any further. If the heir cannot take, as such, there is then one other character in which he can take: he must claim under the will. Doubtless an heir may take as devisee in such a case, but then he must shew from the will itself a gift in his favour. He must shew an intention that in the events which have happened the heir should take; but this supposition the proposition itself excludes, because it assumes an intention to bestow the whole benefit on

others; and there is not in this case, or in the case supposed, any intention expressed, or to be implied, as to the destination of the property in the event of the disposition made not taking effect. If indeed an heir claims as such, he is not defeated by the intention to disinherit, if manifestly any such intention for any reason fails to take effect. I am now considering the claim of the heir, not by virtue of that title which the law gives to him of inheriting all the property not effectually given away, but as a devisee under the will—but as the person designated by this testator as his devisee, and in the event that has happened. If the testator was simply to direct an investment of a sum in land, and declare no trust in it, the heir might with some plausibility contend the testator could have had no other object but to create or add to his real estate, and that it might be enjoyed in that line by whom that description of property is by law inheritable. But it is obvious, when the particular purpose of the investment is declared, and the particular persons are specified, as alone the objects of the testator's disposition, there is no place for any such contention. If, under such circumstances, the heir were to take as devisee, he would take in defiance of all the rules by which the rights of other persons claiming as devisees are regulated. He would take not only without any words of gift, or any expression of intention in his favour, but against the true intent that others and not he should have the whole interest in the property. If the devise of personalty for a purpose, part of which fails, be to be considered as a devise to the heir to the extent and as far as the object fails, why is not a devise of land to be converted into money for purposes which partially fail, to be considered as a devise to the next of kin to the extent of the failing of the first object of the gift? The same expressions may be used in both instances; and yet in one the legal successor to land is to take, yet in the other the legal successor to money is to be excluded. Under the circumstances, and for these reasons, had the case come before me to be decided on principle, and on authority independent of two or three cases to which I shall particularly refer, I should not have felt any difficulty in deciding against the claim of the heir. It remains to be considered whether I am bound by these cases to decide in his favour. An observation was made by Mr. Pemberton at the hearing, which removes much of the difficulty which would otherwise have arisen from the cases, namely, that no authority of an earlier date than *Ackroyd v. Smithson* ought to have much weight with me. The force of this observation will be felt, on adverting to what Lord Thurlow says in deciding that case. He says, 'I used to think, when it was necessary for any purpose of the testator's disposition to convert the land into money, that the undisposed land would be personalty.' Now this is precisely the argument used as to the conversion of money

into land by Mr. Hodgson; and here I cannot but observe, that this subject of conversion has given rise to two of the ablest arguments ever addressed to any court—that by Lord Eldon on the one side, in *Ackroyd v. Smithson*, and that by Mr. Hodgson on the other, in the present case—an argument, which has, since it has been delivered, been frequently mentioned at the bar in terms of the highest praise, and in which I gladly avail myself of this opportunity to express my entire concurrence. In that argument it was necessarily admitted, if all the purposes of a devise failed, the whole belongs to the heir (*quæ* next of kin). But it was contended, that if the purposes are to be in part executed, and so that the right to have such an investment of money in land effectually existed in any one to answer such partial purpose, that the land so purchased, after answering such partial purpose, belongs to the heir. So thought Lord Thurlow, as to land directed to be sold, before the argument in *Ackroyd v. Smithson*. No wonder then that there should be found before that time traces of authority in favour of the heir's claim to money, as there was of the next of kin's claim to land: but the exclusion of the latter is now too well settled to be disputed, and the argument for the heir rests on a supposed difference between the two. But no such difference was supposed to exist before *Ackroyd v. Smithson*: why then should it exist now? If there be any substantial difference in principle, let it prevail, but if in principle there be no distinction, is not the decision of *Ackroyd v. Smithson* and the subsequent cases of higher authority than any decision which may have taken place before the principle was so thoroughly discussed and established as it was in that case? In deciding in favour of the next of kin, I am following the principle of *Ackroyd v. Smithson*, and maintaining that uniformity of decision as to the conversion of land into money, and of money into land, which was supposed to exist before that time. The case of *Lechmere v. Lord Carlisle* * was cited for the heir; but this, and all other cases in which the conversion was in the lifetime of the testator, I consider as not bearing upon the case. Indeed, in one view, these cases may be thought to bear against the claim of the heir. They proceed on this—that whereas, by the obligation to convert money into land in the lifetime of the settlor, the money had become land in the ancestor, whenever the property was so situated the heir was held entitled to it. In the present case, the heir claims that which unquestionably was personalty at the moment of the death of the ancestor. Of the other cases cited for the heir, some were in support of his right as such claiming by inheritance, others in support of his claim as devisee. I will consider the latter class first. *Smith v. Claxton* †, which does not appear to me

* 3 P. W. 211.

† 4 Madd. 484.

to have much application. There land was directed to be sold for purposes, some of which failed: it was decided the heir took what was not required for the purposes of the will; and the only question was, whether he took it as money or as land. This has no bearing on the question, whether in this case the heir or the next of kin of the testator are entitled. There the observations of Sir John Leach may be material, when some other of his decisions are to be observed upon hereafter. He says, 'The heir at law is entitled because the real estate was land at the devisor's death, and this part of the produce is an interest in that land not effectually devised, and which therefore descends to the heir. It is for this reason that the produce of an estate which the devisor directs to be sold can never be strictly part of his personal estate. If a devisor directs such produce to be paid to his executors, and applied as part of his personal estate, the executors take it as devisees.' *Amphlett v. Parke** came before the same learned Judge first. He thought the case came within the authority of *Durour v. Motteux*†, and *Mallabar v. Mallabar*‡, and expressed his regret he was there bound to decide, that in that case, as the real estate was directed to be sold, and the proceeds were directed to be taken as part of the personal estate, and to be applied, together with his personal estate, in paying personal legacies, a gift of the residue of the personal estate passed, by the death of the legatee, a legacy arising from the real estate. He says, 'It is only from deference to these two cases that I arrive at the conclusion in this case, that the testatrix had in her view the improbable intention, that the monies arising from the sale of the real estate should, for purposes not foreseen by her, have the same quality as if at her death they had been part of her personal estate.' Sir John Leach adhered to this opinion when the case was brought before him in 1827, as reported 4 Russell, 75; but Lord Brougham reversed this decree, and decided in favour of the heir. Whatever may be the right decision in *Amphlett v. Parke*, the circumstances are so different from the present case, that it cannot be considered as bearing upon it. In that case the question was, whether the proceeds of the real estate, which were destined to the lapsed legacies, passed under the residuary clause. In the present case there is no residuary clause, but the heir claims under a direction to purchase land for purposes which fail. *Phillips v. Phillips*§ comes nearest to the present. In that case there was a devise of land for sale, and a direction that the proceeds should be deemed to be part of the personal estate, and should be subject to the disposition afterwards made of the personal estate. The proceeds of the sale and the personal estate were then given to trustees to pay the debts and legacies, and the residue of the proceeds and

* 1 Sim. 275. † 1 Ves. 390. ‡ Cas. t. Talb. 78. § 1 M. & K. 649.

of the personal estate was to be divided into fifths, to be paid to five residuary legatees, the death of one of whom occasioned a lapse as to one fifth. The question was, whether so much of it as arose from the proceeds of the land belonged to the heir or next of kin. Sir John Leach thought the next of kin entitled, resting his judgment on cases which had decided that the residuary clause might pass what was intended for legacies which lapsed or could not be carried into effect, considering the provision of the will before him as amounting to a direction, that the proceeds of the real estate should be considered as personal, not only for the purposes of the will, but for purposes never contemplated by the testator. To support that decision on his own principles, he must have considered the will as amounting to a direction that the proceeds of the land should be applied not only to the purposes of the will, but, in the event of any of those purposes failing, for the next of kin. It forms no part of the present purpose to consider whether that case can be supported on principle, or on any preceding authority. It is sufficient to observe, that it professes to be founded on a direction, that the proceeds of all the land should be deemed to be part of his personal estate, and it was merely a construction put on such a bequest: in the present case there is no direction that the money to be invested should be deemed to be part of the testator's real estate. If there had not been such a direction in *Phillips v. Phillips* Sir John Leach states that the rule established in *Ackroyd v. Smithson* would have prevailed. His judgment, therefore, in that case is no authority for the claim of the heir in this. In the next case of *Jessopp v. Watson** he decided in favour of the heir, because he did not find in the will an expression equivalent to a direction that the proceeds of the real estate should for all purposes be considered as if it had been personal estate at his death. On principle, therefore, the heir has not the authority of that learned Judge, because it cannot be said in this will there are any expressions equivalent to a direction that the money to be invested should be considered as if it had been real estate at the time of the testator's death. In *Robinson v. Knight*† the testator directed land to be purchased, and that it should be settled, after a previous limitation, to the use of his own right heirs, and the question was between the heir at law and the residuary devisee. This was a mere question of construction between the parties, each of whom had upon the will sufficient terms of gift, whereas in the present case there is an absence of any terms of gift in favour of either of the contesting parties. In support of the claim of the heir as such, not as devisee, the case of *Hayford v. Benlows*‡ was cited, not on account of the point decided, which was merely that under the will the residuary legatee took

* *Ibid.* 665.† 2 *Eden*, 155.‡ *Ambl.* 582.

clear of debts, which were held to be payable out of the real estate, but for the sake of certain expressions used by Lord Cowper in giving judgment. He says, 'If a sum of money could be devised in trust to be laid out in land, and the uses to which the land should go be not declared, if the money thus devised be considered as land, why should not the benefit of the money go to the heir at law as a resulting trust?' It is on this, in the first place, to be observed, that this was not a point in the case, but the expression is merely a *dictum*. The decision was in 1716, and therefore long before *Ackroyd v. Smithson*, which was in 1780; and Lord Cowper throughout considered the rule as to money directed to be laid out in land, and land directed to be sold, as identically the same. Had he therefore considered the rule as to the proceeds of land directed to be sold to be as it was established in *Ackroyd v. Smithson*, he could not have used this expression as to money directed to be invested in land. It is also to be observed, no case is cited as bearing on the proposition alluded to in the judgment. The case of *Leslie v. The Duke of Devonshire** is that which creates the greatest difficulty. In that case the testator, by deed, created a trust of 60,000*l.*, which he had on mortgage, and certain freehold leases and leases for years. The 60,000*l.* were to be laid out in land, to be settled as to part on certain uses to his son and two daughters, and their children (it failed with them, all dying without issue), the ultimate remainder to Joyce Leslie, in fee. As to certain other parts, to certain other uses to his widow and children, which failed, and with ultimate remainder to Thomas Lyster in fee. And as to 8,500*l.*, part of the 60,000*l.*, due on a particular mortgage, and his freehold leases and leases for years, on trust, to secure certain annuities to his daughters, and the fee of the land to be purchased by the 8,500*l.*, and the absolute interest in the freehold leases to his son. In this deed there was reserved a power of revocation; and the testator by his will revoked the grant of two leases for years, and of a mortgage, part of the 60,000*l.*, but not part of the 8,500*l.*, and he charged his annuities to his daughters on the 8,500*l.* mortgage, and another of 6,700*l.*, not included in the settlement; and he introduced another annuity to another person; and then directed, that the said annuities being paid, the surplusage of interest of the two mortgages, or of the rents of the land to be purchased, should be paid to his son for life, and then should be settled in trust, after the manner, and under the same conditions, limitations, and restrictions, as his other estates were directed to be settled. All the testator's children died without issue, but the son devised all his real and personal estate to his wife; she died intestate as to her real estate, and the Duke of Devonshire, who was her heir, and who derived his title from the tes-

* 2 B. C. C. 187.

tator's son, claimed the 8,500*l.* and the 6,700*l.* To support this claim, it was endeavoured to shew the testator's son had been entitled to these sums as real estate. It was immaterial whether he was entitled under the deed, as devisee under the will, or as heir. His counsel made three points: first, whether the gift was void, and, as such, went to the personal representative; secondly, whether it was to be divided into portions between the classes of devisees; and, thirdly, whether it went to the third class, that is to say, to the son in fee; and they insisted on the third of these propositions. It is to be observed, that they did not claim it as having vested in the son as heir, on the supposition of the devise being void for uncertainty, although that would have been equally maintainable, but seemed to assume, if the devise was void, then the personal representative would take the mortgages, and, if the decision had been merely in favour of the Duke's claim as deriving title through the heir of the testator, it would obviously have been referred to the ground taken in argument by his counsel, and would have been no authority in support of the claim of the heir in the present case; but, according to Mr. Brown's report of the judgment, Lord Kenyon took no notice of the point urged, but decided in favour of the title of the heir, on the ground of intestacy, and this without time taken for consideration, without any one case being cited, or any argument addressed to that question. Possibly, Lord Kenyon's view of the question was mistaken by the reporter: as it stands, it appears to be an authority for the claim of the heir. The character of the Judge entitles every decision of his to the highest respect, but in this case the circumstance above mentioned detracts from the authority of the opinion expressed. The case of *Tregonwell v. Sydenham** was also much relied on; but that case also is applicable only on account of certain observations of Lord Redesdale, and not from the decision itself. The testator devised land in strict settlement, subject to a certain trust for raising 20,000*l.*, which were directed to be laid out in the purchase of land to be settled to certain uses, which were void, as being too remote; and the decision was, that the 20,000*l.* belonged to the heir. This decision does not touch the present question; that was not personalty directed to be invested in land, but land first directed to be converted into money and re-invested into land, and all the purposes for which this was to be done having failed, the heir took the land so directed to be converted into money. Lord Redesdale does not advert to this circumstance, but is made to say, 'It has been established in many cases, that where land is directed to be turned into money, or money is directed to be laid out in land, both shall be considered as that species of property into which they are directed to be converted. Considering the 20,000*l.* as land, the disposi-

* 3 Dow. 194.

tion not being capable of being carried into effect, who is to take? The heir at law must take. If the testator had directed 20,000*l.* to be paid out of the personal estate, and lands to be purchased, these lands, on failure of the intended purpose, would go to the heir at law; the personal representative could not take, as the money was converted into land.' It is to be observed, Lord Redesdale, in this observation, considers the same rule as applicable to the conversion of land into money as money into land, and yet the observation he makes as to the latter, if applied to the former, would be directly at variance with *Ackroyd v. Smithson*. Unquestionably, however, if Lord Redesdale did use this expression, the heir at law in this case has his high authority in support of the proposition for which he contends. But I can consider them only as *dicta*, there being other and better grounds to support that judgment. The case of *Fletcher v. Chapman** has been considered as conclusive in favour of the claim of the heir. It is so treated in Mr. Jarman's edition of Powell on Devises, vol. ii. p. 74, and was so argued in this case. If I considered that case as a distinct decision of the point in question, I should, as the decision of the House of Lords, have felt bound by its authority. That case, therefore, required my most anxious consideration, and I have had the Registrar's Book examined, for the purpose, if possible, of throwing some light on the report. The particulars of that case, as taken from the Registrar's Book, are as follows:—George Goodman, the testator, by his will directed 1,000*l.* to be invested in the purchase of lands, to be so settled as that William Goodman, his nephew, should have an estate therein for his life only, and in case William Goodman did not do such acts as should be necessary whereby to limit the said land so to be purchased as that he might only have an estate for life therein, and likewise to bar himself of all other claims and demands in, unto, or out of the estate of George Goodman, then he devised to the said William 40*l.* only. Jane, the testator's widow, was his administratrix. She paid William Goodman 300*l.* on account of the 1,000*l.*, and advanced him 200*l.*, which two sums he laid out in the purchase of land, and then died, leaving two children, George, who afterwards died, and the defendant, Jane Fletcher, both at that time infants. The defendant Cockerell was the guardian of these children, and on their behalf entered into an agreement with Jane, the administratrix of the testator, by which it was arranged that the 200*l.* advanced by her to William should go in further part of the 1,000*l.*, and she should pay to Cockerell the remaining 500*l.*, which was accordingly paid, whereon he conveyed certain land to Jane, the administratrix, and to the defendant Newton, as a security that the 300*l.*, the 200*l.*, and 500*l.* should be laid out and settled according to the intent of the testator. Elizabeth, the

* 3 B. P. C. Toml. ed. 1.

late wife of the plaintiff, Thomas Chapman, was the heir-at-law of the testator, and the other plaintiff, Roger, was Thomas Chapman's son. Jane, the administratrix of the testator, died, and there is no statement in the pleadings as to any representation of the testator's estate having been obtained after her death. The plaintiffs were the surviving husband of the heiress of the testator, and his son, and the defendants were Newton, the trustee, and Cockerell, (who had entered into the arrangement, and who had received the 700*l.*, and who was also administrator to William Goodman), and Jane, the only surviving child of William Goodman; and the object of the bill was, to have it declared the 1,000*l.*, or the land purchased with it, belonged to Elizabeth, the heiress of the testator, as against the children of William Goodman. On the part of the defendant Cockerell, it was insisted the whole administration to the testator had been granted to Gabriel Goodman, with Jane: he died in the lifetime of Jane, and they had agreed the testator's debts and legacies should be paid, and to that end the securities in writing concerning his personal estate should be deposited in the hands of the defendant Newton. He then stated a suit, after the death of William Goodman, to which Elizabeth Chapman, the heiress of the testator, was party, in which a decree was made in 1680, to take accounts of the testator's estate. He then stated the estate so conveyed by Cockerell to Jane, as administratrix to the testator, had been settled on Jane and George, the two children of William Goodman; the other part of the 1,000*l.* had been invested on mortgage; and insisted that Jane Fletcher, the only surviving child of William Goodman, was entitled. The defendant Newton, by his answer, represented himself solely as a trustee of the land conveyed by Cockerell, and submitted to act as the Court should direct. By the decree it was declared, that, the testator having declared that William Goodman should have an estate for life only, the 1,000*l.*, or land purchased therewith, belonged to the testator's heir-at-law, and not to the children of William Goodman. It directed the payment of the 700*l.* received by Cockerell from Jane, the administratrix of the testator, and an account, and payment of the rents of three-fifths of the land purchased by William Goodman, and a conveyance of the three-fifths, and the other two-fifths of the rents of this land to be paid to the defendant, Jane Fletcher; the plaintiff, Thomas Chapman, to have the whole of the 700*l.*, and the interest of three-fifths of the land, for his life, and afterwards to his son, the other plaintiff. It is quite clear, in this case, there was no contest between the real and personal representative of the testator, George Goodman. There was no personal representative before the Court. It was said in the argument in the case now before me, that Newton represented in fact the personal estate, because it had been assigned to him. There is no trace of this in the pleadings of record: it

is undoubtedly stated in Cockerell's answer, that by articles in 1773, it was agreed between Jane, the widow, and Gabriel, the administrator of the testator, the testator's debts and legacies should be paid, and to that end the securities and writings concerning his personal estate should be deposited in the hands of the defendant Newton. This was only to insure the arrangements between the parties, and gave Newton no interest in the property; and he does not claim any. From this decree the child of William Goodman appealed, and Chapman, representing the heir of the testator, was respondent. It is reported in 3 B. P. C. 1. But here, also, it is obvious there was no question between the real and personal representative of the testator. Jane, his administratrix, had paid the 1,000*l.*, and no person representing his personal estate was in any way a party to the contest. It is a case in which the heir was declared entitled to the money directed to be laid out in land, not to any declared purpose which failed, but for the limited interest, that is, for the life of William Goodman; but it is not a decision that, even in that case, the heir was entitled against the personal representative. No such case was made by the pleadings, or argued, or decided, and, there being no party to raise that question, this case therefore decides nothing as to the present matter in contest. *Greaves v. Case*, as reported 1 Vesey, jun., 548, would appear to be an authority for the heir, but in the report of the same case, 2 Cox, 301, it is stated the plaintiff was both heir-at-law and next of kin, and therefore entitled in one character or the other: it was not discussed in what character he took, and the point decided was a different one. Many cases were cited against the claim of the heir, but as they were either to establish general principles, which I do not consider in dispute, or with reference to the point in the case, to which the opinion I have formed on this particular point makes it needless for me to advert, I do not think it necessary to examine them in detail. I may observe, no case was cited against the heir in which the point now contended for by him was directly raised and decided. It was argued, indeed, that *Abbot v. Lee** was precisely this case; but it appears the decision, although against the testator's heir, was not in favour of his personal representative, but gave the 550*l.* and 150*l.* to the representative of Mary, the legatee, considering that her interest in these sums was absolute. There are, however, some of the cases cited for the defendant, which, although not precisely the case before me, are most important, as shewing, that when the whole object of the bequest of money to be converted into land fails, the personal representative is entitled, and as shewing the question of conversion of money into land, and land into money, has by the highest authority been consi-

* 2 Vernon, 284.

dered as regulated by the same rules. Such are the cases of *Robinson v. Taylor**, *Townley v. Bedwell*†, besides others, to which I need not refer. The result of the whole authorities seems to be, that before *Ackroyd v. Smithson* no distinction was recognised between the doctrine as applicable to a conversion of money into land, or land into money—that as to both an opinion prevailed, that when a conversion was necessary, and part of the object failed, the unappropriated proceeds belonged to that representative on whom the law cast that description of property in which such proceeds were found to exist. This, as to land converted into money, was corrected in *Ackroyd v. Smithson*; but no case has occurred in which the point has been argued and determined as to money converted into land. I say argued and determined, because, if determined in *Leslie v. The Duke of Devonshire* and *Fletcher v. Chapman*, it certainly was not argued; but there are undoubtedly *dicta* of very eminent Judges, since that time, which seem to shew an impression on their mind, that the principle of *Ackroyd v. Smithson* was not to be applied to a conversion of money into land. Those learned Judges had not the benefit, which I have had, of hearing the point fully and most ably argued; and having, after the fullest consideration, come to the conclusion that that principle does apply to the present case, and as I am not bound by any of the authorities to maintain a distinction which was not originally supposed to exist, and which cannot be maintained in reason, and which, therefore, if maintained, would be a reproach to the law as it stands, I feel myself fully justified in preserving the uniformity of the rule, as applicable to the two cases, by deciding against the claim of the plaintiff; and I may be allowed to express some satisfaction in finding I am not compelled by authority to hold that any heir should take, as such, what had no inheritable quality, but was pure personal estate, at the time of the ancestor's death, or that, as devisee, he should take that which was never destined for him, but was in most unquestionable terms given to another. One other point was made for the heir, to which now I will very shortly allude. It was said, as the testator had directed the estate should be purchased and remain in his name, his heir must have been a trustee of it, and, if it had been so purchased and so vested in the heir, there would be no equity on the part of the next of kin, as against the heir, to convert this land into money. That proposition fails in all its parts: there is nothing to shew the heir is to be a trustee: the heir might indeed have borne a different name: if he had been a trustee, he would have held it as a trustee, and not as heir. And the rule, that there are no equities between representatives, would have had no application; and if it had, it would have been fatal to the claim of the heir, who now seeks, after all the purposes of the will are

* 2 B. C. C. 595; 1 Ves. jun. 45.

† 6 Ves. 194.

answered, to convert to his own benefit, against the next of kin, what was money at the testator's death, and has ever since so remained. The argument of John James Stephens, the plaintiff, rests on the supposition that the 30,000*l.* ought to be considered as land as between the real and personal representative; and as my judgment is against the validity of such claim, the bill must be dismissed, but without costs. I have some reluctance in refusing to give the defendants the costs of suit, because, in general, I think that those who try the experiment of a claim should pay the expenses of it if they fail, however reasonable the ground may have been for trying it; but this question is so involved in difficulty, from what has taken place and been said in courts of equity at different times, and arises so much from the act of the testator, from whom both claim, that I think it fair each party should bear their own costs."

No. III.

Sands v. Nugee. Supra, p. 471.

July 5th, 1836.

The Duke of Roxburgh, by will dated Nov. 5th, 1803, gave all his estates, real and personal, to John Wanchope and James Dundas upon trust to sell, &c., "with full power to each of the trustees before named or to be named by the testator, who should accept of the trust, to name and appoint any other person he pleased to succeed himself in the trust thereby created after his own decease, and also to the said nominees to name other persons to succeed to them respectively in the said trust after their death, and that from time to time, and in all times coming, aye, and until the trust should be completely executed, and the purposes thereof fulfilled. And also with power to the said trustees named or to be named by the testator, or to be assumed, as said was, accepting and surviving, or their *quorum* aforesaid, to assume and appoint any person or persons they pleased as joint trustees in the trust thereby granted in place of any former trustee or trustees named or to be named by the testator, and assumed as aforesaid, who should decline to accept, or who should leave Britain or go abroad, or who should have deceased without naming a successor or successors to himself or themselves in the trust thereby created, and which trustees so to be assumed should have as full and ample power as was given to the trustees thereby appointed."

The Duke, a short time before his death, executed a deed of instructions in the nature of a codicil, in which he gave certain directions as to the application of the proceeds of the sale, and died in March, 1804.

Mr. Dundas disclaimed both as trustee and executor. Mr. Wanchope

took out probate, and acted as trustee, and, in 1829, died, having, by will, dated in 1823, appointed John Spottiswoode, David Robertson, and Warren Hastings Sands to succeed him in the trusts of the Duke's will, and devised and bequeathed to them all the trust estates.

Spottiswoode and Robertson disclaimed, and Sands alone proved Wanchope's will, and acted in the trusts.

Sands put up certain premises to auction, and, by the sixth condition of sale, it was provided that "every purchaser should accept and be satisfied with a conveyance from the trustee then acting in the execution of the trusts of the said will and codicil, by the latter of which it was declared that purchasers should be effectually discharged and secured by the conveyances, releases, or discharges of such trustee."

Mr. Nugee became the purchaser, and signed the agreement, but afterwards objected to the title, on the ground, in the words of the joint opinion of two eminent conveyancers, "that the devise in the will of John Wanchope to *three* trustees was not a valid exercise of the power which authorized each of the trustees to appoint any other person he pleased to succeed himself in the trusts thereby created after his own decease, and that the power, which followed, to appoint any person or persons they pleased as joint trustees, did not apply to the case which had happened. That the purchaser was not bound by the sixth condition of sale to accept and be satisfied with a conveyance from the acting trustee under the will of John Wanchope as the trustee then acting in the execution of the trusts of the will and codicil; for it could not be intended to exclude the purchaser from objecting that the party was not a trustee authorized to act in the trusts." Sands filed a bill for specific performance; and, the Master having reported that a good title could be made "according to the contract," the defendant excepted to the report. Nugee was a willing purchaser; and the point arising upon the power was suggested to the Court without being argued. The Vice-Chancellor was of opinion that Sands had been duly appointed under the power, and therefore overruled the exception, and, which he said would strengthen the title, with costs.

No. IV.

Timson v. Ramsbottom. *Supra*, p. 508, 509, 512.

January 13th, 1837.

The Master of the Rolls.—"This case comes on upon two petitions, one of which asks to confirm the Master's report, and the other prays that the Master's report may not be confirmed. The case is, that in the year

1819 Anthony Bacon, the elder, was one of the executors of the testator Richard Ramsbottom, and is said to have had the sole management of the affairs. Anthony Bacon, the younger, having attained the age of twenty-one years, was entitled to a certain share of the testator's residuary estate, and, being in want of money, his father made him some advances, and agreed to make those advances up to 5,000*l.* on having an assignment of his son's interest in the testator's estate; and thereupon, by indenture dated 6th of February, 1819, and made between Anthony Bacon the younger of the one part, and Thomas Bacon, Robert Langford, and Thomas Walford, of the other part, Anthony Bacon the younger assigned his share of and interest in Ramsbottom's estate to Bacon, Langford, and Walford, upon trust to sell the same, and thereout to pay the sum of 5,000*l.*, with interest at five per cent., to Anthony Bacon the elder, and on trust as to the residue, after such payment, for Anthony Bacon the younger. In 1821 the advances of the father were made up to the full sum of 5,000*l.*, and thereby he completed the consideration for which the deed was executed. It does not appear he ever communicated the transaction to his co-executors, and on this the question arises, whether the knowledge which one of several executors has of an assignment executed by him, the co-executor, is notice of the existence of the assignment to the prejudice of a subsequent assignee. Anthony Bacon the elder died in 1827, and in the following year Timson, who was the surviving executor, filed a bill for the administration of the estate in this Court; a decree was made in 1830, and in 1831 the residue of the testator's estate was brought into Court. After this, Anthony Bacon the younger executed a deed, dated 13th of March, 1832, and made between himself of the one part, and Charles Corfield of the other part, and thereby assigned his share and interest in Ramsbottom's estate to Charles Corfield, on trust to retain and pay 1,000*l.* which he had lent to Bacon, together with the interest and costs, and upon trust, as to the residue, to pay the same to Bacon. Of this assignment notice was given to the executor Timson on the 9th of March, and on the validity of this notice two questions were raised. It is said this notice is invalid, because, first, it was not accompanied by any inquiries as to prior incumbrances; and, secondly, the fund being in Court, an application ought to have been made for an order to prevent the fund being paid out without notice to the assignee. The first question, as to the invalidity of the notice, is answered by the case of *Foster v. Blackstone*, which was affirmed in the House of Lords, and in which the argument was used without effect; the second reason might have been of considerable weight, if the executor of Bacon the elder had obtained an order before Corfield; but as both parties after-

wards obtained an order on the same day, there is no competition in that respect; and, neither party having any advantage with respect to the order, I think the notice to the executor must be considered good. If no notice was given by either party, it would be the duty of the executor, and it is the constant practice, to inform the Court of any incumbrances before an order is made for the distribution of the fund. But the notice to the executor of Ramsbottom of Corfield's assignment would be of no avail, if at the time the assignment was taken Corfield had notice of the prior assignment made by Anthony Bacon the younger to his father. The next question raised is, whether Corfield had such notice. In such a case it appears to me the *onus probandi* is on the party who charges notice: there is no attempt to prove that notice, and it is distinctly denied; and the only doubt on the subject is, whether Charles Corfield had constructive notice through the medium of William Corfield, his solicitor? William Corfield has not in terms denied that notice: his affidavit is to the effect, that at the time of the indenture Anthony Bacon told him there was no incumbrance on the property, and he was to share with his brothers and sisters in the division to be made of Ramsbottom's estate. This does not meet the charge of notice in distinct terms, but it is inconsistent with the supposition that at the same time Anthony Bacon, from whom alone the knowledge of the prior assignment was to come, informed Corfield that his share of Ramsbottom's estate was subject to a prior incumbrance so large as that which really existed: and it is entirely consistent with the inference to be drawn from the deed itself, by which Anthony Bacon covenanted and declared that he was rightfully entitled to his share of the estate, and had not charged or incumbered the estate, or any part thereof, in any manner whereby Charles Corfield might be hindered from recovering the sum, which he had a full right to assign. To meet the inferences deducible from the deed, and from the affidavit of William Corfield, the executors of Anthony Bacon the father have tendered the affidavit of Anthony Bacon the son, in which he states William Corfield was his solicitor, and was employed by him to borrow the sum of 1,000*l.*, the repayment of which he told William Corfield he was willing to secure by assigning to the lender his share of Ramsbottom's estate, subject to the previous assignment of the 6th February, 1819, which was to secure 5,000*l.* actually advanced by his father to him, or for his use. The affidavit contains other statements to the effect, that the deponent believed Charles Corfield had notice of the prior assignment, and that part of the money was applied in satisfying William Corfield's costs and other claims, and that in 1827, which was five years before the date of the transaction, William Corfield was aware of the prior assignment, when he stated it was of no validity; but as the statement would not, even if the reception of the affidavit was free from

objection, afford evidence to fix Charles Corfield with notice at the time of the assignment, I shall not notice them further. The statement that, in the transaction itself, Bacon told William Corfield, the solicitor of the vendor, that the assignment intended as a security was to be subject to a prior charge, is undoubtedly material, and makes it necessary to consider whether the affidavit ought to be received, and if received, what weight is due to it under the circumstances of this case. The reception is objected to on two grounds: first, because it is produced to contradict the declaration of the same person, contained in his own deed; and, secondly, because it is produced to support the claim of Anthony Bacon the elder, in whose estate the deponent is interested. I am of opinion the first ground of objection cannot be supported, however the weight of the testimony may be affected: the man may be examined as a witness to contradict declarations of his own in a deed which he has executed; and as to the second objection, it appears the deponent has, by an assignment made to his brother Charles, ceased to have any interest in his father's estate. Supposing this to be correct, I am obliged to compare this affidavit with the affidavit of William Corfield, and with the deed, and with the covenants contained in the deed, and the result of my consideration of this evidence is, that Charles Corfield is not fixed with constructive notice of the prior assignment. What remains, therefore, is to consider, whether there was sufficient notice of the assignment of the 6th of February, 1819; and I regret to say, none of the authorities referred to appear to me to afford a satisfactory principle. In *Dearle v. Hall* the funds were invested in the names of trustees, and notice was given to all. In *Loveridge v. Cooper* the funds were invested in the names of trustees, and notice was given to the only survivor. In *Foster v. Blackstone* the incumbrance was charged on the life estate in the real estate vested in trustees, and notice to their solicitor was held good notice to them. In *Smith v. Smith* the incumbrance was on a life interest in funds and real estates vested in trustees, and notice to one trustee was held sufficient; and that case certainly approaches the nearest to the present in principle. In that case, however, there might be circumstances to induce the Court to assume, that the trustee, who had notice, communicated his knowledge to his co-trustees. But none of the cases cited at the bar appear to me to be like the present, of a father and son having a transaction of this sort between themselves, the father being one of several executors—no allegation even that the other executors were informed before the notice was received from Corfield—no ground to presume that the transaction was communicated to the other executors, each of whom had separate authority to receive and pay on account of the estate, and who, if they had no notice of the assignment, might have made payment to the assignee, without incurring any liability

whatever on that account. I think, therefore, after, I admit, a good deal of hesitation, that the knowledge of one of several executors who was interested, and who does not appear to have communicated that knowledge to his co-executors, is not sufficient to create a trust, in which the assignee has done nothing but accepted the assignment; and it appears to me the Master's report must be confirmed, and the cross-petition dismissed."

No. V.

Allen v. Sayer. Supra, p. 605.

"The substance of the plaintiff's bill appeared to be, that Thomas Brooke, Gent., deceased, was in his lifetime seised in fee of a certain messuage or tenement called Drewes, and of several lands and tenements thereunto belonging, lying in the parish of Wanting; and was also seised of a certain parcel of land and meadow in Sutton Courtney, in the county of Berks, of the yearly value of 10*l.* per annum: and, having no issue of his body (the plaintiff being his near kinsman), did make his last will and testament in writing, and after his mother's and wife's decease did thereby bequeath all his real estate whatsoever, in the county of Berks or elsewhere (his debts being first paid,) unto the plaintiff, his heirs and assigns for ever, lawfully to be begotten; and, for want of such issue, to the use of Joseph Brooke, his heirs, &c.; and did give unto his mother the sum of 30*l.* per annum, for her life, to be paid her out of his lands called Blackcrofts, and did (*inter alia*) give unto John Collius, and his uncle Robert Brooke, all his said real estate, together with his two horses, a colt, and corn in the barn, on trust that they should (if occasion should be) not only sell the said hay and horses towards the payment of his debts, but should also sell his shop of wares for and towards the same, together with his lands at Sutton and Highgarden aforesaid, in case his personal estate was not sufficient to pay his debts; and made his wife and mother executrixes of his said will. That shortly after making the said will the said T. Brooke died much indebted, more than his personal estate would amount to pay, by means whereof his wife did, as the executrix, refuse to act or intermeddle with the real (*qu.* personal) estate; and thereupon Anne Brooke, grandmother of the plaintiff, took upon her the burthen of the said will, and thereby became entitled and entered into the personal estate of the said testator, and out of her own estate, and otherwise, paid all the debts of the said testator; and about June, 1688, the said Anne died. That the said plaintiff, on the death of his grandmother, entered on the lands called Blackcrofts, and, as he is advised, ought to have held the said messuage called Drewes, and all other the real estate of the said T. Brooke,

and to have received the rents thereof accrued after the death of the said Anne the elder, his debts being paid out of his personal estate, and profits of his personal estate, and otherwise. That Peter Sayer, about June, 1688, did enter into the house of one — Gamon, where, after the death of the said Anne Brooke, the deeds, writings, &c., of the estate of the said T. Brooke lay locked up in an iron chest, and did carry away the said chest, and possessed himself of all deeds, writings, &c., that were therein. And the said Peter Sayer, on the death of the said T. Brooke, did enter into the lands called Sutton lands, and prevailed with the defendant, Curtis, the tenant thereof, to pay his rent to him, on giving him a bond to save him harmless; and the said Anne the elder, being aged, did not in her lifetime make any effectual prosecution for recovery thereof; but the plaintiff is well entitled thereto by the will of the said Anne (*quæ* T. Brooke), and ought to have an account of the profits thereof since her death. That the said P. Sayer, observing that Collins and Brooke, in whom the estate in law of the said Sutton lands was vested, would not act, and the said plaintiff being then an infant of ten years of age, and his grandmother aged, and not willing to be engaged in a suit for the recovery thereof, the said Peter, having gotten into possession as aforesaid, did, together with Elizabeth his wife, levy a fine *sur conuizance*, &c., and did by some deed declare the use of such fine to be to him and his heirs; and afterwards proclamations were had according to the statute, and after five years passed, and no claim made within that time by the said trustees, whereby, at law, the plaintiff cannot have his remedy, the defendant threatening to set up the fine and nonclaim. That the said plaintiff ought to be relieved against such fine and nonclaim, the same being a breach of trust in the trustees in not making entry before permitting five years to pass after such fine. That in case the plaintiff cannot have satisfaction out of the estate of the said P. Sayer, yet, that the defendant, Curtis, the tenant of the said Sutton lands, ought to be accountable for the profits by him received since the death of the said testator, T. Brooke, for that he was acquainted with the plaintiff's grandmother's title, and for that purpose took security from the said P. Sayer to pay his rent to him. Therefore, that the witnesses to the will of the said T. Brooke may be examined *in perpetuam rei memoriam*, and to discover the deeds of the lands given by the will, and what other the said P. Sayer took out of the iron chest; and that the same, and all other deeds, may be delivered to the plaintiff; and that the said defendants may account for the profits of the said Sutton lands received since the death of the said T. Brooke; and that the fine and nonclaim may be set aside; and that the defendants may discover the personal estate of the said Peter Sayer (1), and what settlement the said Peter Sayer made of his real

(1) He had died before the bill was filed.

estate towards the payment of his debts, and to be relieved, is the scope of the bill. Whereunto the counsel for the defendants (the infant children of Peter Sayer and the trustees for the children, and Curtis, the tenant) insisted that Margaret Brooke, the infant's great-great-grandmother, was, about thirty years since, seised in fee of the said Sutton lands, whereby the same (*inter alia*) after the death of the said Margery, descended unto Richard Brooke, great-grandfather of the defendants, the infants; and the said Richard Brooke being seised in fee of the said premises, and having several children, viz., Richard, his eldest son, who died without issue, Thomas, the second son, under whom the plaintiff claims, and Margaret and Ann, his two daughters, the said Richard, on a treaty of marriage with Margaret, his eldest daughter, to one John Keepe, did agree to settle the lands in question (*inter alia*) upon the said Margaret, and the issue of her body; and accordingly articles of agreement were executed between William and John Keepe on their part, and the said Richard Brooke on his part, whereby the said Richard did covenant to settle the reversion and inheritance of all the lands on the death of Jennings, the tenant thereof by curtesy, which descended to him from the said Margery, upon the said Margaret for her life, remainder to the heirs of her body, or the issue of that marriage; and in pursuance of the said articles the said Richard did, by his indenture, settle the said premises on the said Margaret and her issue accordingly. That the said marriage soon after took effect, and the said Margaret had issue Elizabeth Keepe, the only daughter and heir, who about 1676 married the said Peter Sayer. That about the year 1665 the said John Keepe died, and afterwards the said Margaret his wife died, whereby the premises descended unto the said Elizabeth, and the said P. Sayer, being so entitled in right of his said wife, did, after the death of the said Jennings, which happened about eighteen years since, enter into the said Sutton lands, with other the said Margaret's estates, and, the said Peter being in possession, they did, in 1678, let the Sutton lands to the defendant Curtis, for five years, at 4*l.* per annum, and gave him a bond of 200*l.* for his quiet enjoyment thereof. That the said Peter Sayer and his wife did, in Easter Term, 1678, levy a fine as in the bill, and that they held the same for five years, without any claim made by the plaintiff, and that the said plaintiff, *secundo Gul. et Mariæ*, brought an ejectment against the said Peter Sayer, and the defendant Curtis, for the recovery of the premises, and brought the same to trial at the Berkshire assizes, and set up a title under the will of the said Thomas Brooke, and, after a full hearing, a verdict passed in affirmation of the said Peter's title; and the said Peter, being minded to provide for the defendants Elizabeth, and Peter, and John, did, by deeds of lease and release, convey the said Sutton lands unto the said defendants Elizabeth, the

grandmother, Moses Slade, William Button, and Antony Leaver, their heirs and assigns, in trust for himself for life, and after his decease to sell the same, and the money thereby raised to be equally divided amongst his said younger children; and by virtue of the said deeds the said defendants, the trustees, do stand seised of the said premises in trust for the defendants, the three younger children of the said Peter, who died about 2d February, 1691. And the said defendants insist on the said marriage articles, fine and nonclaim, verdict, and continued possession, in bar of the plaintiff's title to the said lands. And the counsel for the defendant, Richard Brooke, insisted, that he by his answer saith, he is the surviving trustee named in the said T. Brooke's will, and that he never acted therein, and disclaims all interest of, in, or into the said lands in question, and is ready and willing to convey and assign his interest therein, as the Court shall direct, being indemnified by the decree of the Court for so doing. Whereupon, and upon long debate of the matter, and reading the will of T. Brooke, the articles between John and William Keepe, and Richard Brooke, dated the 19th December, 1656, and the proofs taken in the cause, and hearing what was insisted on by counsel on all sides, this Court declared, that the said fine and nonclaim ought not to incur against the plaintiff, who was then an infant, and doth therefore think fit, and so order and decree, that a perpetual injunction be awarded to stay the defendants, the trustees of the said Peter Sayer, and all claiming under him, from proceeding at law for the said Sutton lands; and that the defendant, Robert Brooke, the surviving trustee named in the said T. Brooke's will, and the trustees of the said Peter Sayer deceased, do convey the said Sutton lands unto the plaintiff and his heirs, or unto whom he or they shall appoint, and for so doing they are hereby indemnified; and that the said defendants do come to an account before Roger Meredith, Esq., for the profits of the said premises received by them, or the said Peter Sayer deceased, in taking of which account the said Master is to make unto the said defendants all just allowances; and what upon the said account shall appear to be due to the plaintiff for the rents and profits of the said premises received as aforesaid, the said defendants are hereby ordered and decreed to pay the same unto the plaintiff, or unto whom he shall appoint; but the defendants Jonathan Sayer, Leaver, and Button, are to be charged no further in reference to the profits received by the said Peter Sayer deceased than they have assets of the said Peter. And it is further ordered and decreed, that the defendants do deliver to the plaintiff the deeds and writings of all the lands that belonged to the said T. Brooke, not comprised in the said articles." Reg. Lib. 1699, A. f. 502.

No. VI.

Abbot v. Lee. Supra, p. 663.

“The substance of the plaintiff's bill appeared to be, that George Cuthbert, the testator, having issue two sons, William and Edward, and two daughters, Jane and Mary, did, about May, 1681, make his will, and therein, amongst other things, did devise to his daughter Jane 550*l.*, and to his daughter Mary the like sum of 550*l.*, and directed that those sums should be laid out by his executors in a purchase of lands, *at the discretion of his executors*, within one year after his decease, for the use of his said daughters and the heirs of their bodies lawfully to be begotten; and in case either of his daughters should die before marriage, that then 150*l.* of her money, or in case the money be laid out in lands, then lands of the value of 150*l.*, out of her share of the lands so purchased, should go to the surviving sister, and the other 400*l.* to his sons, equally to be divided between them and their heirs; and the said George Cuthbert, by his said will, did also devise unto his said sons all the lands in his said will particularly mentioned; and in case his sons died without issue, then he devised those lands to his daughters and the survivor of them and their heirs; and he gave the use of his household goods to his wife, and after her decease the same were to be divided amongst his children *at the discretion of his executors*; and of his will he made Jane his wife (now the wife of William Leach), and the defendant Lee, executrix and executor, in trust for his said sons and daughters. That after his decease, the executors executed the will, and possessed themselves of the real and personal estate, but did not lay out any part of the money in a purchase of lands. That both the sons, and Jane, one of the daughters, died in their minority unmarried, and the plaintiff married Mary, the surviving daughter, who also died without issue; and the plaintiff took out letters of administration to her, and thereby became entitled to her legacy of 550*l.*, and to 150*l.* of Jane's legacy. That the defendant Cuthbert pretends that he is entitled to all the estate, both real and personal, of the said George Cuthbert, as his next heir at law, by the words of the said will, and that the defendant Lee ought to account to him, and not to the plaintiff. Wherefore, to have a discovery and an account of the testator Cuthbert's estate, and that the defendants, the executors, may account for and pay to the plaintiff the several legacies devised to the said Mary by the will of the said G. Cuthbert, and the plaintiff be relieved, is the scope of the bill. Whereto the counsel for the defendant William Cuthbert insisted that the defendant William Cuthbert by his answer confessed the will, and that the testator's sons and daughter Jane died unmarried, and that Mary, the plaintiff's wife, died without issue, and he believed the plaintiff was her

administrator, but not entitled to her legacy, for that he the said defendant was entitled to her legacy, for that he the said defendant is entitled to the 1,100*l.* given to Jane and Mary, he being heir at law to the testator and to his children; and that if the 1,100*l.* had been laid out in lands, as it ought to have been, then the same would have descended to him, and that therefore he claims the same, but submits to the judgment of the Court whether the plaintiff be entitled to any part thereof. Whereupon, and upon long debate of the matter, and hearing of what was insisted by counsel on either side, and upon producing of an order made in the said cause, whereby it was ordered that the plaintiff might proceed to hear the cause against the defendant Lee only, without prejudice in regard the defendant Leach and his wife, though duly served with process to appear, yet had not appeared, but sat in contempt to a serjeant at arms, and were insolvent and could not be found, the Court declared, that the 550*l.* legacy devised to Mary, and 150*l.* of Jane's legacy, did belong unto the plaintiff as administrator to his wife, and that the defendant Cuthbert had not any right or title to the same as heir at law to George Cuthbert or his children, or otherwise; and doth therefore think fit and so order and decree, that the defendant Lee do account, &c. (the usual order), and out of the money which shall appear to be in the said defendant's hands, upon such account, the said defendant is hereby ordered and decreed to pay unto the said plaintiff the aforesaid sums of 550*l.* and 150*l.*, or so much thereof as the same shall amount unto." Reg. Lib. 1689, A. f. 177.

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